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Supreme Court of the United States

OCTOBER TERM, ~~1956~~ 57

No. ~~23~~ 3

JUNIUS IRVING SCALES, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 16, 1956
CERTIORARI GRANTED MARCH 26, 1956

Supreme Court of the United States

OCTOBER TERM, 1956

No. 29

JUNIUS IRVING SCALES, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Criminal No. 4320-G

UNITED STATES OF AMERICA

vs.

JUNIUS IRVING SCALES

U.S.C., Title 18, Section 2385—Membership in an organization which teaches and advocates the overthrow of the Government by force and violence

INDICTMENT—Filed November 18, 1954

The Grand Jury Charges:

(1) That during the entire period from in or about January, 1946, and continuously thereafter, up to and including the date of the filing of this indictment, the Communist Party of the United States of America has at all times been a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit;

(2) That from in or about January, 1946, and continuously thereafter, up to and including the date of the filing of this indictment, in the Middle District of North Carolina and elsewhere, Junius Irving Scales, the defendant herein, has been a member of said Communist Party of the United States of America, the defendant well knowing during all of said period that said Communist Party of the United States of America was and is a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, and said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit.

In violation of Section 2385, Title 18, United States Code.
A True Bill.
W. R. Graham, Foreman. Edwin M. Stanley, United States Attorney.

[fols. 6-14] IN THE UNTED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Excerpts from transcript of Hearing on Motions—April 1, 1955

[fols. 15-16] HENRY REYNOLDS, called as a witness by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rein:

[fol. 17] Q. Let's take the Greensboro Division for a moment. Will you tell me briefly the manner in which names are chosen to be on panels for the grand and petit jury for the Greensboro Division?

A. Well, requests are sent out under the joint direction of the Clerk and the Jury Commissioner——

Q. The Clerk is yourself?

[fols. 18-22] A. That's right.

Q. And the Jury Commissioner, who was that?

A. At that time Dr. A. W. Plyler. Requests were sent out under the joint direction of these two, constituting the Jury Commission, to men of knowledge and character and standing who, the best we could figure out, knew the people in the respective counties, and asked them to send in suitable names for the jury service.

Q. Was that request sent out on form letters, Mr. Reynolds?

A. Well, not always, but I'd say a good portion of it was.

[fol. 23] The Court: The question is have you already drawn the panel for the Scales case.

The Witness: Oh, yes, sure.

By Mr. Rein:

Q. And when were the names in the jury box from which you drew this panel placed in the jury box?

A. In 1950 and '51.

Q. There have been no additions since 1950 and 1951?

A. There have not.

Q. Therefore it would be correct to say that the names were obtained for the jury box from which the panel for this case was drawn by virtue of the use of the form letter which is Defendant's Motion Exhibit X—is that correct?

A. No, not all of them.

Q. Well, some of them?

A. Yes.

Q. In other words, I want to make it clear that this form letter was used in obtaining the names which were placed in the jury box from which the jury panel for the Scales case was drawn. Is that clear?

A. No, I just said that they were not all obtained by that form letter in the Greensboro Division.

[fols. 24-33] Q. That isn't my question, whether all were obtained. My question is were any of them obtained.

A. Well, I think it's reasonable to assume that they were.

Q. Can you tell me to whom, as best you can recollect, this form letter, Defendant's Motion Exhibit X, was sent in 1950 and '51?

A. Well, they were sent to the chairmen of the Republican and Democratic Executive Committees of the counties, for one thing.

Q. Of the counties comprising the Greensboro Division?

A. That's right. There were also forms sent to the sheriffs of the counties and there were forms sent to the superintendents of public instruction.

Q. Of these various counties?

A. Yes. I can't remember; there was some variation in the counties and I can't tell you offhand just how that was, but I know they were included.

Q. You know that the chairmen of the Republican and Democratic county committees were included, the sheriffs were included, and the superintendents of public schools, and there may have been others; is that correct?

A. Yes, I think that's as near as I can state it.

[fol. 34] Q. But the letters you got back sent you only the names and addresses of the individuals—isn't that correct—with the statement that the person who sent them believed that they were suitable?

A. Well, largely so, but, as I said a while ago, there were exceptions, folks would make comments, I mean the people who sent them in.

Q. The comments were that they thought they would be suitable for jury service?

A. That was one of the things I mentioned, yes, that they thought they would be suitable for jury service.

Q. You didn't get any comments by people sending in names that they thought they would be unsuitable for jury service, did you?

A. No, but I used my own judgment about some of them. I do recall that when they would send in the name of an attorney or a physicial, or somebody of that sort, that we would eliminate them.

[fol. 35] Q. When you, personally, knew him to be an attorney?

A. Well, if the name indicated.

Q. If it said "Doctor" or "Lawyer"?

A. Well, lawyers don't have separate indication like doctors do. Where they were doctors I certainly did, and I knew most of the lawyers over the district and knew when they were lawyers.

Q. So you would get occasionally names of doctors, where you knew by their title, or lawyers, whom you knew personally, and you would eliminate them from the list on that ground; is that correct?

A. Yes, that's correct.

Q. To get back, you say you have these names in a jury box?

A. That's correct.

Q. In what form are they in the jury box? Is each name typed on a separate card?

A. A separate slip of paper, all uniform size.

Q. They are placed in the jury box, and on this separate piece of paper is the name and address of the person?

A. The county, the name and the address.

Q. And nothing else?

A. That's correct.

Q. Aside from that information which you have in the [fols. 36-62] jury box, you have no other information anywhere else in your office with respect to these jurors; is that correct?

A. No, we don't have any other information.

[fols. 63-75] Q. But the only thing you received from them was names of people and addresses?

A. Substantially so, yes, sir.

Q. And that is the basis of your information?

A. That's right, except——

Q. And that is the basis of your knowledge?

Mr. Stanley: Let the witness finish his answer.

The Witness: Except, as I said, comments from the senders or from other sources.

[fol. 76] CHARLES H. COWLES, called as a witness by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rein:

Q. Mr. Cowles, will you please give your full name and address, for the purposes of the record?

A. Charles H. Cowles, Wilkesboro.

Q. And what is your position there?

A. Deputy Clerk.

Q. For what?

A. For the United States Court for the Middle District.

Q. For the Wilkesboro Division?

A. Yes, sir.

Q. How long have you held that position, Mr. Cowles?

A. Well, I went in there in '41.

Q. You have been Deputy Clerk in charge of the Wilkesboro Division since 1941?

A. Yes, sir.

Q. Did your duties as Deputy Clerk include the selection of names to go into the jury box from which the grand [fol. 77] jurors and petit jurors would be chosen?

A. Well, it is when I am ordered by the Court to do so, yes.

Q. And who would order you to do that?

A. Judge Hayes.

Q. Are you directly responsible to the Judge of the court or are you directly responsible to Mr. Reynolds?

A. Well, I don't know, I guess I'm responsible to both of them.

Q. Did you participate in the selection of names to go into the jury box for the Wilkesboro Division in 1950 and 1951?

A. Yes.

Q. What part did you take in that?

A. Well, the Jury Commissioner and I——

Q. Who was that?

A. That was Mr. R. B. Farr.

Q. Where is he now; is he deceased?

A. He is deceased.

Q. You were telling me the role which you played in selecting names to go into the jury box for the Wilkesboro Division in 1950 and '51.

A. Well, I forget now about whether the office here advised anybody there and advised us to confer with them or not, except a conversation I had probably with Mr. Reynolds [fol. 78] about it. We were told to divide the names equally between the two parties, so far as the number went; that is, we would give the Democrats and the Republicans an equal number of names of persons to give their names to go in the jury box.

Q. That was for all the counties in the Wilkesboro Division?

A. No, that was for Wilkes County—to divide the names in the box equally between the two political parties, regardless of their strength in the county.

Q. And how did you achieve that?

A. I forget what the number was, total number.

Q. How did you obtain the names—this is for Wilkes County you are speaking of, just for Wilkes County?

A. Yes. As I remember it, the men who were selected were the political leaders, chairmen of the political parties, and the superintendent of public instruction, public schools,

C. B. Eller; the now president of the Bank of North Wilkesboro, J. R. Hicks, he was one of them. I just can't now offhand remember; I didn't carry that in my head.

Q. These were gentlemen whom you asked to submit names to you?

A. Yes.

Q. And they did?

A. Yes.

[fol. 79] Q. Were there any other people whom you asked to submit names to you, other than those you have mentioned?

A. Yes, we conferred with others, prominent citizens around over the country, both he and I.

Q. You mean both Mr. Farr and yourself?

A. Yes, sir, the Jury Commissioner.

Q. Were there any other persons you conferred with that you recall?

A. Well, I don't know right now.

Q. And these individuals whom you conferred with and asked to submit names to you then did submit names; is that correct?

A. Yes.

Q. And you had them classified as to whether they were Republican or Democrat to make sure you had an equal number?

A. No, no. We never regarded that as being an equal number. We just took the Democratic list and the Republican list and whether they wholly matched or not we just took what they sent in. They were about the same number.

Q. They came in in about equal number?

A. Yes.

Q. Then you just placed the names these people furnished you in the box; is that correct?

A. Well, I won't say that we just placed them in the box at that time. I don't know whether that list, whether I sent it here to Greensboro or not. The most of the lists were [fol. 80] typed here and sent to me there. As to Wilkes County, I just don't recall whether it was submitted to the Clerk and typed here or I typed it.

Q. Did you get any information—I am speaking now of Wilkes County—with regard to the names of people who

were submitted to you other than their names and addresses?

A. I didn't understand that question.

Q. I think you have indicated that as far as Wilkes County is concerned you asked a number of prominent citizens in Wilkes County to submit names to you of people to go into the jury box?

A. Yes.

Q. Did they give you any other information with regard to these individuals other than their names and addresses?

A. Well, of course some of them—Oh, I can't remember the details that way; I wouldn't know.

Q. You don't have any written——

A. They wouldn't submit me names of persons they didn't think were fit to go into the jury box. They weren't men of that character.

Q. But all they gave you were the names and addresses; is that correct?

A. Well, I won't say that's all. I suppose it's all; I don't see what else they would give me.

[fols. 81-169] Q. You don't have any information in the files of the Wilkesboro Division which would give any further information about the names which were put into the jury box?

A. Well, I don't know whether I have or not.

Q. Do you know about how many jurors went into the box for the Wilkesboro Division from Wilkes County, how many names went in?

A. No, I don't remember that exactly.

Q. Did you have any role in selecting names to go into the Wilkesboro Division other than Wilkes County?

A. None at all.

Q. That was entirely done here from Greensboro?

A. I suppose it was. I didn't have anything to do with it.

[fols. 1-65] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, GREENSBORO DIVISION

Criminal No. 4320-G

UNITED STATES OF AMERICA,

vs.

JUNIUS IRVING SCALES, DEFENDANT

Before United States District Judge Hon. Albert V. Bryan and a jury

EXCERPTS FROM TRIAL TRANSCRIPT

(April 11 through 22, 1955)

APPEARANCES:

EDWIN M. STANLEY, Esq., United States District Attorney,
ROBERT L. GAVIN, Esq., Assistant United States Attorney,
WILLIAM F. O'DONNELL, III, Esq.,
BERNARD V. MCCUSTY, Esq.,
JOHN J. KEATING, Esq., Department of Justice,
Special Assistants to the Attorney General for the United States.
DAVID REIN, Esq., for the defendant.

[fol. 66] The Court: Could you sit on the jury and make a fair and impartial decision on the question of whether or not the Communist Party is an organization that advocates the overthrow of the United States by force and violence?

Mr. Crawford: From what I have learned, from reading about Communism, I might not be able to, sir.

The Court: Could you sit on the case and decide it according to the evidence?

Mr. Crawford: Well, I would have to, sir.

The Court: What is that?

Mr. Crawford: Yes, sir.

The Court: : You feel you could give a fair and impartial [fols. 67-72] trial to both the United States and the Government according to the evidence and according to the law?

Mr. Crawford: I feel somewhat prejudiced towards the Communists. That is what I mean, Judge, from what I have read and what I know about the organization.

The Court: You feel a prejudice based on what?

Mr. Crawford: Communists, as I understand it, do not believe in God. I do. They don't believe in our form of government and our form of life and I like it.

The Court: If those are its purposes then you would be prejudiced against it?

Mr. Crawford: Yes, sir.

The Court: Could you entertain a free mind in determining whether or not they are its purposes?

Mr. Crawford: I will try, sir.

[fol. 73] The Court: If you came to the conclusion that the defendant that is here was guilty, or was not guilty, came to the conclusion that he was not guilty, would you hesitate to return a verdict of not guilty because of possible embarrassment to you?

A Juror: I think I would.

The Court: What is that?

A Juror: I think I would.

The Court: Well, that would be on account of your employment or business association?

A Juror: Embarrassment and—no, wouldn't effect my employment.

[fols. 74-112] The Court: Would you be embarrassed in your employment or business association?

A Juror: No, sir, I don't think so.

The Court: Family or in what way would it embarrass you?

A Juror: Well, I can't tell you.

The Court: Would it embarrass you in your church or club or your other associations?

A Juror: I just wondered if it would possibly.

The Court: You would not be willing to follow your own conclusions regardless of the consequences?

A Juror: Sure. I would try to do that.

The Court: Would you give a fair and impartial verdict regardless of what embarrassment might be?

A Juror: Certainly I would try to; yes, sir.

The Court: Do you have any reason to think that the em-

barrassment would be such that would prevent you from giving a fair and impartial verdict?

A Juror: Well, no, I wouldn't say that. I don't think so.

[fol. 113] The Court: I want to know if you have any reason that would prevent you from giving a fair and impartial trial on that question to both the Government and the defendant.

A Juror: I am afraid I do.

The Court: You could not decide that point from the evidence alone?

A Juror: I would like to but I am not too sure.

The Court: It is because you have an opinion on the subject?

[fols. 114-191] A Juror: Yes, sir.

The Court: Regardless of that opinion, could you go into the jury box and decide the question according to the evidence and the law as given to you by the Court?

A Juror: I would try, sir, yes, sir.

[fols. 192-233] COLLOQUY BETWEEN COURT AND COUNSEL RE PRODUCTION OF STATEMENTS

The Court: My practice has been to require the production of the statements, if and when the witness is called to the stand, so that the defendant may have the advantage of knowing of any prior inconsistent statement that the witness may have made so that the defendant may ascertain whether or not previously he has made a statement from what he is testifying to. That requirement, plus the requirement that the Government give the names of the witnesses to the defendant puts the defendant in as good a position as the Government is. That has been my general practice on it.

[fol. 234] Mr. Stanley: Oh, I do not think we would have any objection, if we were trying a liquor case here, where an officer, A.T.U. officer went out and raided a still and just related to that one case, and he testified, if he did make a written statement on it, and wanted to see it, and see if it was consistent to what he testified to, if the defendant wanted to see, I don't think the Government would have any

objection to that, but we are here dealing with a thing with much deeper——

The Court: Would not the defendant be entitled to know and would not the Government want him to know if a witness has made a statement different from the one he is tes- [fols. 235-276] tifying to?

Mr. Stanley: He can ask him on cross-examination. That is the purpose of cross-examination.

The Court: Yes, but if the Government knows that he is making a different statement from what he made before, the Government itself would want that corrected.

Mr. Stanley: It would be the Government's duty to so inform the Court and defendant and I assure the Court we will so do that. It would be no inconsistent statement so far as the Government can make any determination—it will be entirely consistent with everything that is heretofore done, but, you see, you deal in reports that may go over a period of years. You deal not only with this defendant but with many other individuals.

The Court: I think that can be worked out practically.

[fols. 277-285] JOHN LAUTNER was called as a witness by counsel on behalf of the Government, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. O'Donnell:

[fol. 286] Q. Mr. Lautner, did there come a time when you became a member of the Communist Party of the United States?

A. Yes.

Q. When did that take place?

A. In 1929, November, thereabouts.

Q. Would you describe just briefly the circumstances surrounding your becoming a member of the Communist Party?

A. Well, I moved to New York from Ohio in 1927, and I got associated with activities in New York in a dramatic club, and in 1929 I was asked to join the Communist Party by some of the officials of this club.

Q. Did you become a member?

A. Yes.

Q. How long did you remain a member of the Communist Party?

A. Up to the 17th of January in 1950, with the exception of the time I was in the armed forces.

[fols. 287-288] Q. And what schools were you assigned?

A. In the spring of 1930 I was assigned to a national training school of the Communist Party organized by the Hungarian Nationalist Bureau of the Communist Party.

[fol. 289] Q. What did you do in the school?

A. I studied the subject matter, the subject matters that were given at this school, such as, Marxism-Leninism, Political Economy, Dialectical Materialism, the Decisions of the Sixth World Congress of the Communist International, the Paris Commune, the Party Problems, and similar subject matters.

Q. Were you given a course in the history of the Russian Revolution?

A. Yes, and the history of the Communist International.

Q. In connection with this school, did you use any literature?

A. Yes.

Q. What, would you name some of the literature that was used in connection with this school?

* * * * * * *

[fol. 290] Q. Mr. Lautner, I will show you what has been marked as Government's Exhibit for identification No. 1. It purports to be Manifesto of the Communist Party, and ask you if you can identify this document.

A. Well, this is a copy of the Communist Manifesto, the like of which we had in that school in 1930, but not the exact copy because this copy is published by International Publishers and this is the sixth and seventh printing in 1935, a hundred thousand copies.

Q. Does this document that I have just shown you, Government's Exhibit No. 1, contain the same material as was [fols. 291-292] contained in the Communist Manifesto studied by you at the school?

A. Yes.

[fol. 293-307] Q. Subject to the time that you used the Communist Manifesto in the school in 1930, did you use it again in the Communist Party?

A. Yes.

Q. When or——

A. In, throughout the years of 1930, later on in 1946, '47, and '48, particularly in 1948 because it was the centennial celebration of the Communist Manifesto and discussions around the Communist Manifesto took place in Party councils and of the freshness and of the validity of the Communist Manifesto as to its application today, right today, in 1948 was emphasized and re-emphasized by Party leaders like William Z. Foster and others.

[fol. 308] A. In 1930, after graduation from the training school, around the beginning of July or the end of June in 1930, I was sent to Detroit, Michigan, as District Secretary of the Hungarian National Bureau in Detroit, Michigan.

Q. In this position were you on the payroll of the Communist Party?

A. I was a full-time functionary and on the payroll of the Communist Party.

Q. How long were you a full—for how long a period were you a full-time functionary of the Communist Party?

A. Up to the time I left the Communist Party in 1950, January.

[fol. 309] Q. Thereafter did you receive another position in the Communist Party?

A. Yes. In 1932 I came back to Cleveland, Ohio, District Secretary of the Hungarian National Bureau in Cleveland, and one of the editors of a daily Communist paper in Cleveland, Ohio.

Q. Thereafter did you receive another position in the Communist Party?

A. Yes, in 1933 for awhile I was on the District Language Department in the Communist Party in New York. Then in 1933, fall, I got an assignment to Section Organizer in—— of the Communist Party in New York, and I functioned in that capacity up to about May, April of 1936.

Q. Thereafter did you have another position?

[fol. 310] A. Yes, I became a District Organizer of the

Communist Party from April, 1936, to the end of 1940 in the state of West Virginia. I then went to the National Training School in New York, and after graduation from that, I was assigned to their Nationality Groups Commission of the Communist Party and Secretary of the Hungarian National Bureau, and I functioned in those capacities up until the time I was drafted into the Army.

Q. When were you drafted into the Army?

A. In November, 1942.

Q. How long did you serve in the Army?

A. I was in the Army thirty-one months; twenty-five months overseas.

[fol. 311] Q. Now with regard to the Communist Party, what did you do, if anything, after you returned from the military service?

A. I reported back to the national headquarters at 35 East 12th Street, to the National Secretary of the Political Association, Communist Political Association. At that time John Williamson.

Q. When you reported there, what happened, if anything?

A. I was assigned to read certain documents. The Duclos letter, the draft resolution, the preconvention discussion articles, Foster's letter to the National Committee and similar documents dealing with the crisis and the American—in the American Communist Party.

* * * * * * *

[fols. 312-318] A. I was reassigned to the Nationality Groups Commission of the Communist Party and National Hungarian Bureau Secretary and I served in that capacity until the end of 1945. I became sick for awhile. Then in '46, somewhere round about there or thereabouts, I was assigned to take charge of the Communist Party members in the building trades in New York. I functioned in that capacity up to the early spring of 1947. For a few months I was assigned to the New York water front on concentration work there, and in May, 1947, I was assigned as head of the New York State, the Review Commission of the Communist Party, and I functioned in that capacity, and in addition to that in 1948, September, I was assigned also to the National Review Commission of the Communist

Party, and I functioned in these two capacities up to the time I left the Communist Party on the 17th of January, 1950.

[fol. 319] By Mr. O'Donnell:

Q. Now, directing your attention to the year 1940, did you attend a National Training School of the Communist Party?

A. Yes.

Q. And where was that school held?

A. That school was held in New York City. It was one of the floating schools where we met from day to day in a different place.

Q. And was this—this was a Communist Party School, of course?

A. Yes. This was the highest National Training School of the Communist Party.

Q. Prior to this school, I think I may have skipped something here—did you attend a Communist Party School earlier?

A. I——

[fol. 320] Q. Subsequent to it?

A. I organized one in Cleveland, Ohio, and I had new members classes in New York in the 1930's, and then this 1941 National Training School.

Q. In connection with these classes you taught in—during the 1930's, can you name some of the books that were used as the basis of instruction, if they were used?

A. Yes.

Q. What were they?

The Witness: We used first of all "Why Communism." We used "Peters Manual on Organization." We used a Little Lenin Library Series, such as, "Foundations of Leninism," "Problems of Leninism," "What Is To Be Done," "Left Wing Communism," "State and Revolution," "The Program of the Communist International," Bittleman's Pamphlet, Milestone's History of the CPUSA. We used a special ten-volume edition of the Selected Works of Lenin. We used a two-volume edition of Leninism by [fol. 321] Joseph Stalin, a letter to the American workers, and all the Little Lenin Library Series that were available and printed by the mid 1930's up till about 1936.

A. This is "Foundatons of Leninism" by Joseph Stalin, International Publishers, ten cents, copyright 1939, International Publishers Company, Incorporated, second hundred thousand. This is a 1939 edition but the contents are the same as the Little Lenin Library edition which was available in earlier editions.

Q. Was this book circulated, distributed during the period of your membership in the Communist Party?

A. Yes. Throughout my membership in the Communist Party.

Q. Does this contain the substance of the material that you taught in schools?

A. Yes.

[fol. 322] Q. That you taught?

A. Yes.

Q. I will show you what has been marked for identification as Government's Exhibit No. 6, which purports to be "Problems of Leninism" and ask you if you can identify that.

A. Yes. This is the Little Lenin Library Volume Nineteen, "Problems of Leninism" by Joseph Stalin, International Publishers, 381 Fourth Avenue, New York City.

Q. And you used it in the schools that you taught?

A. Yes.

Q. And it was taught to you in the schools?

A. Yes, sir.

Q. I show you what has been marked as Government's Exhibit No. 7 for identification, "State and Revolution" and ask you if you can identify that.

A. Yes. This is "State and Revolution". This is a special edition by International Publishers, third printing, 1935, a hundred thousand copies, part of the Little Lenin Library edition which was used and taught in Communist Party classes where I attended as a student and a teacher.

Q. I will show you what has been marked as Govern-
[fols. 323-328] ment's Exhibit No. 8, "Left Wing Communism", and "Infantile Disorders".

A. This is the Little Lenin Library edition by V. I. Lenin, International Publishers, Fourth Avenue, New York. That was used in the Communist Party Schools where I was taught and where I was teaching.

Q. I show you what has been marked as Government's Exhibit No. 9, which purports to be "What Is To Be Done".

A. Yes, this is the Little Lenin Library, Volume 47, "What Is To Be Done" by V. I. Lenin, which was used in classes where I was taught and where I was teaching in the Communist Party.

Q. I show you what has been marked as Government's Exhibit No. 10 for identification which purports to be "Imperialism, The Highest State of Capitalism" and ask you if you can identify that.

A. Yes. This is Little Lenin Library, Volume 15, copyright 1939, International Publishers. However, the Little Lenin Library was also published before 1939 and was used in classes where I was taught and where I was teaching.

[fol. 329] By Mr. O'Donnell:

Q. You refer to the "History of The Communist Party of the Soviet Union"—I don't know what— would — explain what that was?

A. That book, "History of The Communist Party of the Soviet Union (Bolshevik), is the authorized history of the Russian Communist Party, authorized by the Central Committee of the Communist Party of the Soviet Union, and it was distributed through the Party over here in, from 1939 on, a mass distribution of a hundred thousand was made at the beginning, additional hundreds of thousands were printed later on. The whole Party, as such, was urged to organize the widest possible distribution and studies of this book as guide for the American Party.

Q. Was this book circulated and distributed throughout the Communist Party during the entire time you were in the Communist Party?

A. It was circulated and studied throughout the time I was in the Communist Party from 1939 on.

[fols. 330-334] Q. Did you use this book in the courses that you taught during the time you were a member of the Communist Party?

A. Yes.

In 1941 in the National Training School. In '46 and '47 and '48 while I was teaching classes after the reconstruction of the Communist Party.

[fol. 335] Q. Would you state the courses you took?

A. In that '41 National Training School, we had Marxism-Leninism, Political Economy, American History, The History of the CPSU, Party Organization, Party Problems, Problems in China, and we had a course in science. We had a Party Problems in the Trade Union Movements, and other subject matters.

. . . . . .

A. In the course of Marxism-Leninism we used the Lenin Selected Works. We used the Little Lenin Library editions. [fol. 336] Q. Were these the same books that were just introduced or copies of them?

A. Yes, copies of them.

Q. Without repeating the numbers——

A. That is correct. We used Leninism by Stalin. We used The Program of the Communist International. We used Marxist Capital. We used the Party resolution that was adopted at the 1940 convention. We used Strategy and Tactics. We used the Theory of the Proletarian Revolution. We used the Dictatorship of Proletariat. These are three red-covered books with excerpts in each book organized around different subject matters and dealing with theory and other material that we used.

[fols. 337-339] By Mr. O'Donnell:

Q. Mr. Lautner, I will show you what has been marked as Government's Exhibit No. 13 for identification which purports to be a book marked, titled, "Strategy and Tactics" and ask you if you can identify that.

I might ask you preliminarily, was that one of the books used by you in connection with the schools and studies of the school?

A. Yes. The "Strategy and Tactics" of the Proletarian Revolution, International Publishers, New York, copyright 1936; it was used, studied.

Q. I show you what has been marked as Government's Exhibit No. 14 "Dictatorship of the Proletarian".

A. "Dictatorship of the Proletariat", International Publishers, New York, copyright 1936, was used and studied in the 1941 National Training School.

Q. I show you what has been marked as Government's Exhibit No. 15, "Theory of the Proletarian Revolution" and ask if you can identify that?

A. Yes. This is the "Theory of the Proletarian Revolution", International Publishers, New York, copyright 1936, used and studied in the 1941 National Training School.

[fol. 340] By Mr. O'Donnell:

Q. Now after you returned from the service, once again, were there—did you attend any meetings of the Communist Party?

A. Yes, I attended the 1945 National Convention and [fol. 341] the first part of the New York State Convention of the Communist Party.

Q. Where was the 1945 National Convention held?

A. In New York City, in a place called Fraternal Clubhouse, which is around 46th Street or thereabouts. It would be Broadway and Sixth Avenue, New York City.

Mr. O'Donnell: What happened at that?

The Witness: The Communist Party was reconstituted. Browder, Earl Browder, General Secretary of the Com- [fols. 342-349] munist Political Association or of the Political Association was removed from this function. His policies were repudiated and the Convention firmly established itself to go back to the basic teachings of Marx, Engel, Lenin and Stalin and he elected at that Committee——

By Mr. O'Donnell:

Q. With regard to this reconstitution and going back to the fundamental principles of Marxism-Leninism, what action did the Convention take?

The Witness: It adopted a constitution and in the preamble it ascertained this basic return to Marxism-Leninism.

[fol. 350] Q. Now, Mr. Bautner, I believe that you previously testified that after you rejoined the Communist Party, 1946, you were thereafter assigned as organizer to the Building Trades Section.

Now, in addition to that position were you assigned any

further duties in connection with the Communist Party or by the Communist Party?

A. In the first place, I didn't rejoin in 1946. I reported back when I came from the Army, came back from the Army, and for awhile, while being in the National Hungarian Bureau and the Nationalities Group Commission of the Communist Party, I was assigned in 1946 to organize the Communist Party membership in the building trades in New York City.

[fol. 351] By Mr. O'Donnell:

Q. What were those duties that you were assigned at that time?

A. To take part in the three-prong program that unfolded at reconstitution of the Party in 1945, that is, the reorganization of the Party, the re-education of the Party membership on a Marxist-Leninist basis and to take part in a concentration policy.

Q. Now, in connection with the re-education in the Party were you given a specific assignment?

A. Yes. I was assigned to teach Communist Party classes in New York City in the years of 19, part of 1946, in 1947 and part of 1948.

Q. Did you carry out this assignment, these assignments?

A. Yes.

Q. Now what was taught in these classes by you, in a general way?

A. The subject matters that I taught were Marxism-[fol. 352] Leninism, Political Economy, Party Organization, Party Structure, Democratic Centralism, Party Discipline.

Q. Did you use any guide in the conduct of these classes?

A. Yes, I used a number of guides. First of all, the books themselves. Then we had a national outline prepared by the National Educational Commission, and also I was guided by discussions and instructions by the New York State School Director, a person by the name of Albert Moreau.

Q. Now what was the title of this class that you used, you referred to outline, I believe.

A. That was the Marxist-Leninist guide that was prepared by the National Educational Commission of the Communist Party.

[fol. 353] By Mr. O'Donnell:

Q. Mr. Lautner, I will show you what has been marked as Government's Exhibit No. 18 for identification and ask you, which purports to be, "Outline on Fundamentals of Marxism" and ask you if you can identify that?

A. Yes, this is one of the guides that we used in those classes in '46, '47 and '48.

[fol. 354] Q. Now you testified that you also used other books in connection with that class and at this time—or those classes over this period—and at this time I will show you Government's Exhibit No. 5 and ask you if you used that; that is, "Foundations of Leninism"?

A. We used "Foundations of Leninism".

Q. Did you continue to use that throughout the membership in the Communist Party?

A. Yes, sir.

Q. And was that used by the Communist Party in their teachings?

A. Yes.

Q. Is the same true of "State and Revolution"?

A. The same is true of "State and Revolution".

Q. That is Exhibit No. 7.

A. "History of the CPSU".

Q. Exhibit No. 12?

A. "Imperialism".

Q. Exhibit No. 10?

A. "Problems of Leninism".

Q. Exhibit No. 6?

[fol. 355] A. "The Communist Manifesto".

Q. Exhibit No. 1?

A. "Left Wing Communism".

Q. Exhibit No. 8?

A. "Left Wing Communism", "What Is To Be Done".

Q. Exhibit No. 9?

A. "The Struggle Against Revisionism".

Q. I show you Government's Exhibit No. 13, "Strategy and Tactics".

A. We used "Strategy and Tactics".

[fol. 356] Q. Government's Exhibit No. 14, "The Dictatorship of the Proletariat"?

A. Yes.

Q. Government's Exhibit No. 15, "Theory of the Proletarian Revolution"?

A. Yes.

Q. These books were used throughout your membership in the Communist Party by the Communist Party in its teachings?

A. That is correct.

Q. Now you referred to teaching the course on Marxism-Leninism and I will ask you this question at this time:

In substance, was the subject of Marxism-Leninism that you taught during this period and was taught by the Communist Party in these schools, was that the same Marxism-Leninism as taught to you in the Training School in 1941?

The Witness: In substance the same was taught on the [fol. 357] subject matter of Marxism-Leninism in '46, '47 and '48 as it was taught in 1930 when I went to Training School and also in the 1941 National Training School.

[fol. 358] The Witness: Marxism-Leninism is the writings and teachings of Marx, Engels, Lenin and Stalin, and its applications in this era, which began about the turn of the century, which era is known as the era of monopoly, capitalism and imperialism. That is the theory and tactics of the Proletarian Revolution in general, and the theory and tactics of the dictatorship of the proletariat in particular. It is the philosophy of the class struggle. It is the enemy of class collaboration and class peace.

[fol. 359] The Witness: The dictatorship of the proletariat is the form of state unrestricted by any law, the decrees are the order of the day as situations and conditions present themselves, and the way it is evaluated by the vanguard of the guard of the working class, the Communist Party.

The Witness: An imperialistic nation is one that subju-
[fol. 360] gates other people, smaller nations, smaller countries, either by force or economic penetration and economic influence and is bent on war and Fascism.

For instance, the Communist Party features that the United States is the leading imperialist nation in the world today.

The Witness: A Proletarian Revolution is when two conditions exist, objective and subjective conditions. Objective conditions are when a Government is in a crisis, when that Government cannot rule by the accepted and practiced ways and rules, when there is a deep economic crisis, or there is a war and when there is a large, say, in a given country, parallel with these objective conditions, if there is a powerful Communist Party, not necessarily numerically powerful but a Communist Party that exerts decisive influence amongst large sections in the key industries that [fol. 361] has a list in addition to that from the lower middle classes and national minorities in a country, and that is capable to give proper guidance and capable to evaluate the situation from day to day, or from hour to hour, when these two conditions exist, the Communist Party under the leadership of the Communist Party itself is ready to take these forces into a decisive battle to bring about a change in the social structure of that society by destroying the governmental apparatus by force and violence and bring about the dictatorship of the Proletariat and pave the way towards Socialism.

By Mr. O'Donnell:

Q. Now you also, you refer to the Communist Party as the vanguard. What is the meaning of vanguard as taught to you in the Communist Party?

The Witness: Of the Proletariat, the leader is the Communist Party, the vanguard of these forces. This vanguard does not share leadership with any other political parties in the course of these events and it is conscious of [fols. 362-385] the fact that it alone, the Communist Party alone, decides and leads these forces.

By Mr. O'Donnell:

Q. Now are these principles which you have just stated, are they found to be documented in any place?

A. Yes.

Q. Where are they found to be documented?

A. They are found to be documented in the writings of Lenin and Stalin and such pamphlets as "Problems of Leninism", "Foundations of Leninism", "State and Revolution", "History of the CPSU", and other documents, statements by Lenin and Stalin.

[fol. 386] Q. Now, Mr. Lautner, you mentioned that during this period you taught at a number of Communist Party Schools, and I would like to ask you at this time specifically if you taught at the Jefferson School of Social Science?

A. Yes. We had a number of Party classes in that school, in that building.

Q. Did you teach the classes yourself?

A. Yes.

Q. And what is the Jefferson School of Social Science?

A. The Jefferson School is a Party Front Organization where they indoctrinate Party members and others who have inclinations to enroll in the school in Marxism-Leninism, Political Economy, and other subject matters.

[fols. 387-388] Q. And when did you teach at the school?

A. In 1947 I had a number of classes in there were section functionaries and the subject matter of Marxism-Leninism, Party Organization, Party Structure and Political Economy.

[fols. 389-393] The Witness: Yes, Your Honor, the Executive Director of the school, David Gold, was a Party leader attending Party or Commission meetings, educational meetings, and in my capacity as security officer and head of the New York State Review Commission, I had meetings with them on the question of security of the building, on the question of—and other problems too—was completely controlled by the Party, the whole institution.

[fol. 394] Q. Mr. Lautner, would you at this time explain the organization of the Communist Party as taught by you in the course of these schools and on the basis concerning which you testified just before the recess, and starting with probably the lowest group in the Communist Party.

Mr. Rein: I am sorry. I did not hear the question.

(The reporter read back the question.)

The Witness: Yes. The basic organization of the Party is the Party Branch. If those members live in a given small area that is known as the community branch, if the Party members work in a specific shop or factory, the Party members there are known as belonging to a shop branch. If there aren't sufficient number of Party members in a given shop, but there are scattered Party members in the same industry in various shops, they are organized into an Industrial Branch. If there is a factory and the Party has no members in that particular factory, they select Party mem-
[fol. 395] bers in a community club or from an Industrial Branch. They organize them into a group and they assign them to concentrate to that shop until they build a Party in that shop. That kind of a branch is known as the Industrial Concentration Branch.

The branch breaks down into groups of three to five members in order to have a better check-up on the members as far as dues, system and attending Party meetings is concerned.

The Party Branch is led by a Branch Executive Committee. The following members of the Branch are eligible to become members of the Branch Executive. The Branch Organizer, the Membership Secretary, the Finance Secretary, Labor Secretary, Press Director, Educational Director or
[fol. 396] Group Captains——

By Mr. O'Donnell:

Q. I might ask you one question at this time, Mr. Lautner.

The explanation that you are giving concerning the Com-
[fol. 397] munist Party Organization, would that be basically the same after 1948 and until you left as it is at this particular time?

A. There was a slight change. First of all the National Committee was reduced from a size of fifty-three to thirteen. The National Review Commission was not elected in 1948 but was appointed, and in addition to this structure of 1948 and underground structure was being built.

[fol. 398] In a larger community where there are a number of branches, community branches, shop branches, industrial branches, branches are given leadership to by

a Section Committee. Members of the Section Committee. The Section Committee is elected by representatives or delegates from the Branches who come to a confer- [fol. 399] ence or a convention once every two years. The Section Committee has the political responsibility and responsibility to the Party for the Party activities in that Section where all these Branches are, and the Section Committee has a staff in order to expedite and carry out the activities of the Party in that particular Section.

On a larger scale, in a state organization or in a district all these city, county sections and branches are given leadership to by a District Committee or a State Committee of the Communist Party. In some instances there are more [fol. 400] than two Districts in a state, like, for instance, in the State of Pennsylvania there is a district, the Philadelphia District of the Communist Party, and then there is a Pittsburgh District over the one district of the Communist Party. In other instances, more than one state belongs to one district organization of the Communist Party.

By Mr. O'Donnell:

Q. Excuse me, Mr. Lautner. I ask you at this time during this period concerning which you are testifying, do you know if there was an organization for the State of North Carolina?

A. Yes, there was.

Q. What was that organization?

A. That was a State Organization and the District Organizer was a person by the name of Bernie Friedland.

A. The District or State Organization has manyfold activities that it has to carry out and in order to function efficiently and to the most advantage of the Party, in larger districts various departments are set up under an Organization Commission in the District The head of the District [fols. 401-403] Organization of the Communist Party is the District Organizer or the State Chairman of the Communist Party's Association or the Organizational Secretary. Then they may have the Literature Director, Legislative Committee Secretary, Nationality Group Commission Secretary, Women's Commission, Review Commission, Secretary Negro Commission, Secretary Labor Commission, Secretary

Educational Committee Director, Youth Commission Secretary, Veterans' Commission Secretary, Press Circulation Director, Cultural Division Organizers, Financial Committee Secretary, Farm Commission Secretary, all these departments and secretaries are supervised and given guidance to by the State Committee and through the State Committee the District Organizer or the State Chairman of the Parties and his close associates, like the Organizational or Executive Secretary of the District, or the State Organization.

The State Committee likewise is elected by a State Convention where delegates from that whole district or state from the lower organizations who were elected delegates come to convention and then they in turn elect a State Committee at the convention who gives guidance and leadership to the whole District, or whole State.

[fols. 404-437] The Witness: Yes, Your Honor.

Now decisions of the National Committee are binding on all Party members throughout the Communist Party in the United States, whether they agree with it or not. They must carry out Party decisions. They can object to it, but they must carry it out and later on they can have a hearing wherever they have a disagreement with a decision along the line.

[fol. 438] Q. Mr. Lautner, was there any change in the basic aims and objectives of the Communist Party during the course of your membership in the Party, that is, from the time you joined until the time you left in January, 1950?

The Witness: As to the basic aims and objectives of the Communist Party, there was no change from the time I joined the Party up until the time I left the Party. Those basic aims are stationary and they are set for this whole historical period which is known as monopoly, capitalism [fol. 439] and imperialism.

The Witness: The ultimate aim of the Communist Party of the United States is when these two conditions, objective and subjective conditions, are given, that I described before, a national crisis, or a war, on one hand, and the ability of the Communist Party to give leadership, to decisive [fols. 440-496] sections of the working class, neutralize other sections of the population, when these conditions are

present, to bring about the destruction by force and violence of the imperialism, monopoly, capitalism and its governments, that is the basic aim and objective of the Communist Party, and through destruction of the state apparatus and power of monopoly, capitalism, imperialism, to bring about Socialism through the dictatorship of the *Totali*tariat.

By Mr. O'Donnell:

Q. Is it applicable in this country, the United States?

A. The United States is the leading imperialist government in the consideration of the Communist Party.

[fol. 497] EXCERPTS FROM TESTIMONY OF JOHN LAUTNER, CROSS

Q. What is the first case you have ever testified in publicly? Was it before the Subversive Activities Control Board?

A. That is right.

Q. And that was in——

A. 1952.

Q. February 7, 1952?

A. '52; that's right.

Q. You were then asked with reference to this same [fol. 498] book, this was a position of Mr. Foster in the position of—and the position of the Communist Party, is that not right, and your answer, Well, according to this book that was the position and that was the thinking of William Z. Foster, but may I add this, that this whole thing that you read is highly speculative and it has no basis and no reality. And the question, Speculative or not, it was the position of the Communist Party, is that not right? And your answer, That is right.

Do you recall those questions and answers?

A. Yes, but after that I found Foster's repudiation and I know about it today.

Q. Oh, you found it after 1952? You didn't know about it?

A. No. After this hearing I checked up and I found his repudiation. I was correct there and I am correct here.

Q. In February, 1952, you did not know of Foster's articles written in 1950; is that correct?

A. That is correct. That skipped my mind, or there was a lapse in my memory, and I checked up and I found his repudiation.

Q. That is the difference that you did not know about it at that time?

A. At that time if I would have known about it, I would have stated so at that time too.

[fols. 499-510] Q. Well, this was some two years after the article appeared?

A. Well, there are too many articles to check up on, but I did after it.

Q. Didn't you also testify in that same hearing that you disagreed with Mr. Foster, as the views he expounded in that book?

A. Yes, I did. In spite of the fact that I didn't have his June article, I disagreed with him, and then later on, he came around and agreed with my point of view.

Q. You testified that you disagreed with Mr. Foster.

A. That is right.

Q. As a matter of fact, you disagreed with him at the time that the book came out, isn't that correct?

A. No, at the time we were discussing it at 1952 in that hearing I disagreed with Foster and I disagree with him today.

[fol. 511] Q. Was it not also the position of the Communist Party that while supporting the election of a broad people's front of government it would also seek to persuade the American people that ultimately Socialism would be a superior economic system to capitalism?

A. Yes.

Q. Was it not also the position of the Communist Party that if Socialism could not be peacefully established in the United States by elections and parliamentary methods, the reason would be that the trusts of the monopolists would try to prevent this by force and violence?

A. That is not so.

Q. What?

A. That is not so.

Q. Now I ask you, Mr. Lautner, referring to your testimony at page 611 and 612 of the transcript of the record in the Lightfoot case, whether or not it is true that when

you were asked that identical question your answer is, That is what the Communist Party said; yes?

A. The question is, Was it not also the position of the Communist Party, Mr. Witness, that if Socialism could not be peacefully established in the United States by elections [fols. 512-516] and parliamentary methods, the reason would be that the trusts and the monopolists would try to prevent this by force and violence.

Q. And your answer?

A. The answer was, That is what the Communist Party said; yes. But, that is not my position.

[fol. 517] Q. You have testified, I believe, on direct testimony about some preparations for an underground organization; is that correct, Mr. Lautner?

A. That's correct.

Q. Isn't it a fact that the purpose of that was so that if the Party, the Communist Party was declared illegal, that there would be a group of people who could conduct a campaign to bring the Party back to legality; wasn't that [fols. 518-553] the purpose of setting up that organization?

A. That was one of the purposes, but the primary purpose was to enable the Party to function under any and all conditions.

Q. You have previously testified when asked that question that the purpose was to bring the Party back to legality.

A. That was what we said to the Party membership; that is correct, but the primary purpose was to enable the Party to function under any and all conditions.

[fols. 554-561] RALPH C. CLONTZ, JR., was called as a witness by and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

[fol. 562] By Mr. Stanley:

Q. Now following that conference with the agent of the F. B. I. what did you first do?

A. The first move I made toward contacting the Communist Party was made on September the 9th of '48 when

I addressed a postcard to Junius Irving Scales at his post office box in Chapel Hill, North Carolina. On that postcard I said that I was interested in Communism and that I was a Duke law student. That was the substance of the postcard.

Q. Did you receive any reply from the defendant, Scales, in regard to that postcard?

A. Yes. One or two days later I received a large cardboard box full of Communist literature, "Daily Worker," "Political Affairs," "For an Everlasting Peace For a [fol. 563] People's Democracy," and a large supply of these documents, and then I received a letter approximately September the 13th, dated September the 12th, from Junius Irving Scales in which he stated that he had sent me the literature, expressed gratification at my inquiry and offered, extended me an invitation to visit him in his home at Carrboro, North Carolina.

(The Clerk marked a letter as Government's Exhibit No. 24 for identification.)

A. This is the letter about which I just testified. This signature I know to be the signature of Junius Scales.

Q. Will you read the heading on the letterhead and then read the letter?

A. The heading is "Carolina District Communist Party U. S. A., Post Office Box 2884, Winston-Salem, North Carolina, or Box 62, Chapel Hill, North Carolina."

Over in the left-hand portion it says: "Junius Scales, Chairman."

Then I have on here——

Q. What is the date of the letter?

A. The letter is dated 12 September 1948. The letter is as follows:

[fols. 564-565] "Mr. Ralph C. Clontz, Jr., Box 785, Durham, North Carolina.

"Dear Mr. Clontz, Thank you for your card of the 9th. Under separate cover I have already sent you a rather varied sample of our literature. I hope you will give it close attention. If I can discuss any matter relating to my Party and its program with you in person,

I will be glad to do so. If you so desire, drop me a line in advance. I live at 36 Carr Street, Carrboro, and will be happy to have you call. Sincerely, Junius Scales".

Then at the bottom of the letter there is the printed portion, "For a free, happy and prosperous South."

[fols. 566-569] Q. Did the defendant, Junius Irving Scales, tell you what the "Daily Worker" was, Mr. Clontz?

A. Yes.

Q. What did he say it was?

A. Junius Scales explained to me that the "Daily Worker" was the Party daily newspaper, whereas the "Worker" was the Party week-end edition of the "Daily Worker".

[fol. 570] By Mr. Stanley:

Q. Now, Mr. Clontz, did you later go to Carrboro, North Carolina, and to the home of the defendant, Junius Irving Scales?

A. Yes, I did.

Q. Was there anyone present at this first conference that you had with the defendant, Scales?

A. Yes.

Q. Who was there at that conference besides you and [fol. 571] Scales?

A. When I got to Scales' house, my recollection is only Scales and his then wife, Vera Lacob Scales, were present. After dinner and during the time that the defendant and I were discussing things in the living room, another person came in, one William A. McGirt, known to me as Bill McGirt.

[fol. 572] A. I knew that from Junius Scales' words and from William McGirt's words on that particular occasion. Bill McGirt expressed to me the feeling of exultation that he got when he openly announced to the public that he was a member of the Communist Party and Junius expressed the same sentiment that when he first had openly admitted his Communist Party membership, he had the same feeling of pride that Mr. McGirt had spoken about.

Q. Now what else transpired at that meeting on this [fol. 573] evening?

A. That meeting, Junius Irving Scales inquired into my background, my parents, my general background in the service, my prior schooling, my general outlook on civil rights and other matters of that sort, and he also told me about his background.

Scales told me that he had been born in Greensboro, North Carolina, that his father was a very wealthy Greensboro citizen, in fact, he explained that he had had to live down his rather respectable background in the Communist Party, having an ancestor that had been governor of the State of North Carolina, that his father was a rather outstanding capitalist. Scales told me he was a millionaire. Scales said he had been brought up with private tutors and private governesses and that he had first come in contact with the Communist Party in Chapel Hill. After he moved to Chapel Hill, that he became interested in the Spanish Civil War, and through his interest in the Spanish Civil War he met members of the Communist Party and became interested in what the Communist Party stood for.

At that time he explained to me that he was Chairman of the North and South Carolina District of the CPUSA.

Q. Shortly after the first meeting with Scales did you have an opportunity to see him again?

A. Yes. Right before Christmas as I recall, in 1948, I [fol. 574] went back to Scales' residence on Carr Street in Carrboro at his request to discuss hospitalization insurance with him.

Q. What was discussed at that meeting, if anything, concerning the literature he had previously furnished you?

A. I told Scales that I had read the literature very carefully. He said that he was gratified that I had read it, that he had sent me the literature on a hunch, that he had just gotten in a large shipment from Communist Party Headquarters in New York and that after meeting me and talking to me, he was certain that his hunch had been good. He told me that he was at that time starting to form a publishing company of some sort in North Carolina, and asked me about the advisability of having a corporation or a solely-owned partnership.

Additionally then I posed to Scales the question, If you can have a publishing company and if Communism is the better form of government and the better way of life, why can't we bring Communism here to the United States by educating the people, by showing them that this is the best form of government?

Scales answered me that that was entirely fallacious, that that would never work, that in the first place the Government of the United States owned all the media of communication, the newspapers, the—I don't believe he mentioned television—but the newspaper and radio and other similar mediums; they controlled the schools, the other [fol. 575] institutions of government and that they would not permit the masses of people to learn the truth about this Communism, that in order to get the truth to the people you would first have to destroy the Government and destroy the mediums of communication control and destroy the institutions of Government, that Stalin and his followers had proved conclusively that ideas alone would never change the form of government or would never do anything. He said that it would be nice if revolution happened automatically but, he said, that unfortunately they didn't, that a small militant force had to bring about a change in government by revolution.

I recall he said that that is where we, the Communist Party, come in. He said that Engels, the philosopher of some kind, that collaborated with Karl Marx, had felt that when the revolution comes about, Government would just disintegrate and the people would just sort of run things very loosely. He said that Lenin had proved that that didn't follow, that when the revolution took place in the Soviet Union in Russia, that Lenin had taken the police power, that the Czar had used that police power to consolidate his position and as Junius put it, to protect the masses of the people from the encroachment of the foreign capitalist countries that would try to come in and prevent the revolution.

Scales said, and it made quite an impression on me, that force is the only answer, that ideas alone can never accom- [fol. 576] plish anything.

That was the substance of our conversation at that time.

Q. Did he say about at that time how he was going to bring this force into play?

A. At that particular time?

Q. Yes.

A. Only generally.

It is my recollection that he simply said there would have to be a militant force, namely, the Communist Party, to unite the two classes of people in this country that would be used in the revolution, that is, the Negro nation and the working class or the Proletariat.

Q. Now at that meeting were you given any further literature, booklets of any character?

A. Yes, it is my recollection that it was at this meeting that he sold me "Problems of Leninism", a book by J. Stalin. Also I believe he gave me "State and Revolution", a special paper-back edition, and a publication called "New Times", and I also believe he gave me a copy of "For An Everlasting People, For A People's Democracy".

"The Clerk so marked the books as Government's Exhibits 25 and 26 for identification.)

* * * * * * *

[fol. 577] Q. Have you your initials on them so you can identify they are the identical books given to you by the defendant, Junius Irving Scales?

A. Yes. The book "State and Revolution" was in my personal possession from the time Junius Scales gave it to me until I surrendered it to the Government January the 28th, '55, at which time I initialed it and put the date 1/28/55.

This other pamphlet by Joseph Stalin, this other book, rather, by Joseph Stalin was likewise initialed by me on that same date and frankly, there couldn't be another book [fols. 578-582] exactly like it due to the fact that this was involved in a flood during the time I was up in New York City and was quite damaged and this has also been in my possession since it was sold to me by Junius Irving Scales on the occasion in question.

Mr. Stanley: We offer in evidence Government's Exhibits 25 and 26.

Mr. Rein: I have no objection.

The Court: Let them be admitted.

(The Clerk so marked Government's Exhibits Nos. 25 and 26 in evidence.).

[fols. 583-594] Q. Mr. Clontz, did Mr. Scales tell you, when he gave you these books, as to what you were to do with them and the purpose of giving them to you?

A. Yes, I was told to study the books that he gave me to learn more about his Communist Party and to learn the principles of what he called Marxism-Leninism.

[fol. 595] A. During that period, thereafter, I met with Scales as frequently as could be possible, continued my discussions with him. I was instructed by Junius to read the "Daily Worker" daily and in fact, he sold me a subscription to the "Daily Worker," telling me that he got a commission on the subscriptions by taking it through him and to the "Worker", and——

. . . . . .

[fol. 596] Q. What were you to do with "Political Affairs"?

A. I was to study that and that would give me along with my instructions under Mr. Scales, the Party theory and the Party line on various things that appeared. Additionally I was given by Scales on frequent occasions a newspaper called "For Everlasting Peace For A People's Democracy". This was published in Bucharest, was the official organ of the Cominform sent out to Communist Parties all over the world, according to Scales, was written in English but was published actually in Bucharest. And during that period I met with him, discussed the various teachings of Marx and Engels. I remember particularly around the middle of 1949 Scales gave me a book, among other booklets he gave me, which was personally autographed by William Z. Foster. This was titled "The Twlight of Capitalism". Scales didn't comment particularly about the book other than the dedication. In the dedication Scales pointed out to me that William Z. Foster, the National Chairman, had said that his great grandson, whose name I don't recall, would live in a Communist United States of America.

[fol. 597] Q. I hand you the Defendant's Exhibit No. 1. Is that a copy of one of the books Scales gave you?

A. This is not the identical book Scales gave me, but this is a duplicate of the edition he gave me.

Q. Would you read the dedication?

Mr. Rein: Object, Your Honor. It has already been read in evidence. This is just repetitious, Your Honor. It has already been——

Mr. Stanley: I want to know if this same dedication in this book was in the book given to him.

Mr. Rein: I will so stipulate.

Mr. Stanley: You will so stipulate?

Mr. Rein: Yes.

Mr. Stanley: Would you read it?

Mr. Rein: Objection, repetitious, Your Honor.

The Court: I will let him read it.

The Witness: "To my great grandson, Joseph Manley Kolko, who will live in a Communist United States."

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[fol. 598] The Witness: Well, on numerous occasions in my discussions with Scales, he would lay down the basic strategy of the Communist Party. That was given to me [fol. 599] certainly during the year 1949. I can't recall the exact time because it was given to me on such frequent occasions. Basic strategy of the Communist Party was to bring about a violent revolution through utilization of two major forces. The first was what he termed the Proletariat of the working class.

Now towards the working class, he said that the Communist Party was the natural leader of the working class, and that the Communist Party must lead the unions in their efforts. He said the big difference in the Communist Party and a union is that a union just saw the next hill, whereas the Communist Party knew the over-all goal which was a Communist United States, and, therefore, had more foresight and could direct activities more, so there was a definite program of—he didn't call it infiltration—of participation in union affairs by the Communist Party.

The second force that he said they would use was that of the Negro nation. Now Communists defined the Negroes in

the South, what they call the black belt, as a separate nation all their own, and he says that the Negroes are oppressed by the blood-sucking capitalist. As a matter of fact, when we [fols. 600-601] were discussing why you couldn't do it by reform and education, that was one of the things he mentioned, that there was the eternal struggle between the working class and the Negroes and the blood-sucking capitalist monopolist. He said that they were oppressing the Negro people in the South and all over the United States and that the Communist Party was going to use these two forces to bring about the revolution guided by the Communist Party as the vanguard.

By Mr. Stanley:

Q. What do you mean by "vanguard"?

A. Vanguard, he explained to me to mean the leaders, those in the front of the fight.

[fol. 602] By Mr. Stanley:

Q. During this period did you have any discussion with the defendant, Scales, in regard to the relationship of the Communist Party in North Carolina, to the Communist Party of the United States of America, and then the relationship of the Communist Party of the United States of America to the Communist Party in Russia and, if so, explain?

A. Yes. I did.

Junius explained to me that he was District Chairman of the Communist Party District for the two Carolinas, that the district was an integral part of the Communist Party U.S.A. Now he explained that actually there was not any visible tie between the Communist Party in all countries, but that the Soviet Union was regarded as the mother country and that the Soviet Union controlled generally the policies handed down by the Communist Party here. He said it was only natural since the Soviet Union was the mother country of the working class that the Soviet Union would support the working classes in other countries throughout [fol. 603] the world.

Q. Was any discussion during this period about the effect, that is, with the defendant, Scales, about the effect of an

economic depression in this country with relation to the attainment of the goal that you have related here?

A. Yes, there was——

. . . . . .

Mr. Rein: In other words, these discussions took place some time in 1949?

Mr. Stanley: That is my understanding. That is correct.

The Witness: Yes.

[fol. 604] By Mr. Stanley:

Q. Go ahead.

A. And on other occasions during that period he explained to me that he and the Communists view depressions with mixed feelings. He said it is true that some of the Communists themselves might be out of work, but actually with a depression the Communist Party could reach people that they otherwise couldn't reach, and that for the purposes of the revolution they would welcome a depression and, in fact, they predicted during '49 that a depression would come very quickly.

Q. Now, Mr. Clontz, towards the end of the year '49 do you recall going to the defendant's home in Carrboro again where your over-all work that you had been performing that year was discussed?

A. Yes. I recall one occasion towards the end of 1949, Scales had just recovered from an appendectomy operation, and I met him in Carrboro, North Carolina, at his residence [fol. 605] and had certain conversations with him.

. . . . . .

He also previously had taken a position in his discussions with me that I should not become an actual member of the Communist Party because that would jeopardize my opportunity to get past the bar exam. We had had some Communist Party—Communist Party had had some rather unfortunate experiences with students who were members of the Communist Party both at Carolina and one graduate student at Duke, but on this particular occasion Scales—that he had pretty much changed his mind, that he felt that by

the time I started taking the bar exam in August of 1950 that things would pretty well have changed, that the hysteria that had been gripping the people would pretty much have quieted down. He said that he had just been reading [fols. 606-608] some of Lenin's writings back in 1917 and 1918 and that this was one of the things that he based his opinion on. He commented that Lenin had written about World War I, that World War I was purely capitalist war power and that the Communist Party should oppose it, that around the first of the year of 1917 Comrade Lenin, as he put it, had been very optimistic about the chances of the Communist Party in the Soviet Union to bring about a revolution even though they were a tiny minority.

He commented that in July of 1917 the Czar had driven the Communist Party of Russia underground and had outlawed them. He said that that very next October the Communist Party, the Bolsheviks, had managed to bring about the revolution. Scales said that he saw a perfect analogy here in this country. He said that as soon as the capitalists drive us underground, there will be a revolution. He said that if a depression came along that would accelerate it still further and would make the job easier.

[fols. 609-615] A. Yes. This is the study course of the Communist Party, the Working Class and Industrial Concentration. This is the particular study course that was personally given me by Junius Irving Scales the latter part of December of 1949. This was in my possession until I turned it in to the Government on January the 17th, 1950.

Q. And bears your initials?

A. Bears my initials for identification.

[fol. 616] By Mr. Stanley:

Q. You may proceed.

A. In fact, I actually discussed with the defendant subsequent to this occasion what Mr. Aptheker, who is in the courtroom, said at that time. Mr. Aptheker stated that the Negroes in the South were still in slavery, that the same situation existed as far as the Negroes were concerned now that had existed in the 1860's, that they were being oppressed by the capitalists and that the capitalists were fast losing their ability to find answers to their prob-

lems, that as they continued being unable to answer the capitalist problems the Negroes and working class people [fols. 617-618] who loved freedom would have to revolt. Addressing himself to the matter of revolution, Mr. Aptheker said that a revolution in the United States was a certainty, and a necessity and he said the kind of revolution he had in mind was the kind of revolution that took place in Russia.

During the discussion period Mr. Aptheker was asked whether one in the Soviet Union could have gotten up and made a speech advocating capitalism and whether it was asked—was asked what would happen to one that did that. Mr. Aptheker answered and said first of all there is no point in having discussions in the Soviet Union about capitalism because in the Soviet Union we knew the truth and since we know the truth, that is, that Communism is the best system, it is best that it not be discussed about capitalism. He said furthermore that the adherents of capitalism had been executed at the time of the revolution and there was no one left alive in Russia that could get up in a meeting and discuss the relative merits of capitalism as opposed to Communism.

After this meeting Junius Scales——

[fol. 619] By Mr. Stanley:

Q. Now, Mr. Clontz, did I understand you to say a few minutes ago that after the Aptheker meeting that you discussed the meeting with the defendant, Scales?

A. Yes, I did.

The next day or two or three days later I discussed this with him. He commented that Herbert Aptheker was one of the scholars of the Communist Party and he said that it was one of the clearest statements of Marxist teachings that we would find. As a matter of fact, I wrote, not the defendant but Herbert Aptheker at the behest of the defendant, and asked him for a copy of the text of his speech. He answered me that he didn't have a text and he sent me instead some issue of "Political Affairs" and said that I would find the basic teachings he had given in his speech in the issue of "Political Affairs" he sent me.

[fol. 620] A. Yes. The next time after that that I saw

Scales was on January the 17th, 1950. Now by that time I was seeing Scales two and three times a week, but the meeting of importance that stands out in my mind was the January 17th meeting.

Q. What happened?

A. The reason is that on January the 17th, 1950, I joined the Communist Party with, of course, the prior knowledge and approval of the Government, of the F.B.I. At that time I met with Scales at his home and combination office in Carrboro, North Carolina. He informed me that he had discussed my situation with the Communist Party leaders in the North Carolina, South Carolina District and also with the Durham local club in Durham, North Carolina, that he had explained to them that he did not wish to reveal my identity to the local club because he felt that there was an informant in the Communist Party over there in Durham that might report me to the F.B.I., and for that reason, for purposes of security, he wished to have me become a member-at-large of the Communist Party.

Scales said that it was quite an honor to become a member-at-large, that there were only three of those in the two Carolinas and that the purpose was to protect my identity [fol. 621] so I would not be prevented from taking the bar examination that was approaching in August of 1950.

At that time I was officially taken into the Communist Party. I asked Junius Scales for my Party card. I was told that the Party cards had been done away with quite some time ago as a matter of security, that I would be given no identification whatsoever as a member of the Communist Party, but he did in fact give me a receipt which I paid him my initiation dues and my Party dues on January the 17th.

(The Clerk so marked a slip of paper as Government's Exhibit No. 29 for identification.)

[fol. 622] By Mr. Stanley:

Q. Now at that meeting did the defendant, Scales, give you anything or sell you anything or give you any instructions about your Party membership?

A. At that time Junius Scales said that he would con-
[fol. 623] tinue to tutor me personally in the principles

of Communism that would prepare me to be a member, or would help me be a better member of the Communist Party.

He instructed me to continue in my stuides in Marx and Lenin, gave me a study outline which he said that he personally had prepared. This study outline was based, he said, on a book titled, "The Foundations of Leninism". This book I had purchased from him some time before, and, in fact, the book contained a portion of "Problems of Leninism", a Government Exhibit No. 26. He told me to study "Foundations of Leninism", and the questions he had prepared to use as a guide and that we would get together and discuss the various questions in the outline.

[fol. 624] Q. I hand you this paper and ask you what it is?

A. This is the study questions on "Foundations of Leninism".

Mr. Rein: Does that have an exhibit number?

Mr. Stanley: The paper I am handing has been marked for identification as Government's Exhibit No. 30.

The Witness: These are the study questions about which I testified that I received from Junius Scales at Carrboro, North Carolina.

(The Clerk so marked the paper as Government's Exhibit No. 30 for identification.)

By Mr. Stanley:

Q. What were you told by Scales to do with those?

A. I was told to read these questions over and to use these as a guide in studying the "Foundations of Leninism".

Q. Will you read over the questions that are contained on that questionnaire, please, Mr. Clontz?

A. Title "Study Questions on Foundations of Leninism." No. 1. How are the times when Lenin lived and worked different from the times of Karl Marx?

No. 2, Is Leninism the same as Marxism? Historical roots of Leninism. The second subdivision of No. 1. Why can't the unions by themselves solve the problem of the workers under the conditions of imperialism? No. 2. Do imperialist

[fol. 625] wars make the capitalists stronger? If not, why do they fight?

No. 3. Why are the capitalists cutting their own throats when they oppress the colonial people of the world?

No. 4. Why is capitalism bound to go?

No. 5. Why did the working class revolution take place first in Russia?

No. 6. Is the United States an imperialist country? What nations does it oppress? And a third section heading, Method, No. 1, What was wrong with the world Socialist organization the Second International during the years before the First World War? No. 2. Can the workers establish their one rule if they are in a minority in a country? No. 3. How can a Party be sure its theory and policies are right?

Next section is on theory. No. 1, What is a theory? What purpose does it serve in the working class movement? No. 2, What is meant by the idea of the Party "tailing behind" the working class and the unions? Has the Party in the United States ever done this? No. 3, Stalin outlined the "Three Thesis of the Proletarian Revolution" twenty-five years ago. Does it sound as true now as it did then? How? No. 4. How does a Bourgeois democratic revolution become a Socialist revolution? No. 5. What conditions have to exist in a country before there can be a successful revolution? No. 6. Why was China the weakest link in the imperialist chain today?

[fol. 626] Next section. The dictatorship of the Proletarian. No. 1, Once the workers establish their one rule, what is the life and death problem before them and how can they solve it? No. 2, What makes the dictatorship of the Proletariat the most democratic government in history? Compare the dictatorship of the capitalist class in the United States today with the dictatorship of the Proletariat in the Soviet Union. No. 3. What are the Soviets and how do they work under Socialism?

Next, the peasant question. No. 1. Why was the peasant question so important to the Parties in Russia? No. 2. How did it happen that the peasants in Russia accepted the leadership of the working class first in the fight against Czarism and then in the fight for Socialism. No. 3. Since

the peasant's main desire is to own land, how can he be made an ally in the building of Socialism? No. 4. Do we have any similar problems in this country today?

Next section is entitled in capital letters THE NATIONAL PROBLEM. No. 1, What was the difference in their position on the national question between the leaders of the Second International and Lenin? Compare this with the difference between the policies of England and the Soviet Union today towards China, India and so forth. No. 2. What is the solution to the national problem as shown by Lenin? No. 3. What is the similarity between the peasant problem and the national problem? No. 4. [fol. 627] Should the working class support all national movements? No. 5. How can Stalin and Lenin's teachings on the national question be applied to the Negro question in the United States?

Next section is Strategy and Tactics. No. 1. What is strategy? No. 2. What is tactics? No. 3. Compare the strategy and tactics of the Second International with Lenin's. No. 4. What are the strategy and tactics of the Party in the United States today? No. 5. How did Lenin decide the right moment for starting the armed uprising? No. 6. Stalin says one of the tasks of the tactical leadership is to "locate at any given time" that particular link in the chain of processes which if grasped will enable us to hold the whole chain and prepare the conditions for achieving strategic success. Do you think the fight against chauvinism in our Party today illustrates this? No. 7. What is the Leninist attitude toward reforms? Compare our attitude toward repeal of the Taft-Hartley Act with Phil Murray's. No. 8. How can we achieve a united front under present conditions?

The next section, the Party. No. 1. Who should be members of the Party? Why? No. 2. What should be the relationship of the Party with the working class? 3. How is the Party different from other organizations of the working class like the trade unions, left-wing youth, women's and fraternal organizations? No. 4. Why do we need discipline in the Party? What kind of discipline?

[fols. 628-633] Style in Work is the last section. No. 1. What advice does Stalin give Party members about how

they work? No. 2. What weaknesses does he especially warn against?

That completes the questions on the study outline with Scales.

Q. Did I understand you were to get the Party line to answer those questions out of Government's Exhibit 5 entitled "Foundations of Leninism" by Joseph Stalin?

A. That is correct.

Q. I ask you to look at Government's Exhibit 5 and see if the table of contents as shown in "Foundations of Leninism" and the headings of the various questions *are* on your study questionnaire are identical?

A. Yes, they are. Each one of these headings that I have read off as being in capital letters represents a section of the book entitled "Foundations of Leninism".

[fol. 634] By Mr. Stanley:

Q. Mr. Clontz, following the meeting on January 17, 1950, when you were given the receipts by the defendant, Scales, for your membership in the Party and you were given certain other literature, outlines for study, did you thereafter meet with the defendant?

A. Yes, sir; I did.

The Witness: I met regularly with Junius Scales from that period for quite some time thereafter. Specifically there were a series of meetings in connection with the study outline.

I would read the book "Foundations of Leninism" at home, and then on meeting Scales we would discuss and I [fols. 635-638] would recite on what I had learned from the book.

The first session that I recall took place about February of 1950, some time after my birth date, which was February the 5th. At that time we started into a discussion of the questions and I asked Junius about this matter of the revolution, whether that was something that was going to take part, was going to come about in three or four generations, just when it was going to take place.

Junius answered me, that the Communist Party position in his belief was that the revolution was inevitable, that the depression would bring it about. He said as to when it

would take place, there were many factors that would decide that, but he could safely say that my daughter who was then a little more than one year old, would marry in a Socialist United States of America.

[fol. 639] The Witness: At that particular meeting we discussed also the textbook, "The Foundations of Leninism." This particular textbook Scales pointed out to me as the text and "Bible" for living and fighting for present-day Communists. We had covered at that time a good portion—well, over a hundred and fifty pages I know of the reading material—and he identified that very positively as something that I should study and learn as a Communist.

At that particular time Bernard Friedland came into the room. Bernard Friedland I had learned to be Party Organizer but I didn't know too much about him. He proceeded to cross-examine me for what must have been an hour or an hour and a half. He questioned me about my father's occupation, my ancestry, my background, whether I was from a rich family, a middle-class family or a poor family. He questioned me about my Army service. I explained that I had been an officer in the Army and Junius immediately spoke up and told him that he was sure that my sympathies were not with the officers' class, that I was really a good Communist even though I had been an officer. He questioned me as to my certainty that the Communist [fols. 640-641] Party was the thing for me. He asked me to explain to him why a reformed movement wouldn't work with reference to justice, for example, why you couldn't reform the Jim Crow justice, as he put it, rather than overthrow the Government. I gave him then the reasons that Junius had taught me during this period and he was apparently satisfied with my answer.

[fol. 642] The Court: When was the definition given to you by Scales?

The Witness: On so many numerous occasions, Your Honor, it wasn't a specific matter of his defining the term. Every time he used it, he simply defined the "Socialist United States" as the goal of the Communist Party after the revolution, and thereafter he would say, We will bring Socialism here to this country, or, We will bring [fol. 643] Communism here to this country, and he used the

term interchangeably in his discussions with me. I must have averaged two or three discussions a week with the defendant during the period from '49 until the end of 1950.

Q. On "Foundations of Leninism".

Now I hand you what has been introduced in evidence as Government's Exhibit No. 26 by—entitled "Problems of Leninism" by J. Stalin, and ask you to read from that book, the marked portions on page 131.

A. "Can such a radical transformation of the old Bourgeois order be achieved without a violent revolution, without the dictatorship of the Proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of Bourgeois democracy which is adapted to the rule of the Bourgeoisie, means that one has either gone out of one's mind and lost the normal human [fol. 644] understanding, or has grossly and openly repudiated the Proletarian revolution."

Q. Did you have a discussion of that passage with the defendant, Scales?

A. Yes, I discussed that passage and all the general material included in the "Foundations of Leninism" and some from that particular book.

The Witness: Scales at one of these meetings during February or March of 1950 and I discussed the passage there among other passages. Scales said that it showed the inevitability of revolution, that obviously you could not effect a change in government without a violent revolution. That, he reiterated his feelings, that a depression would come first. He stated that a revolution would come in this country much more easily than it had in the Soviet Union.

I asked him why. He said, "Well, in the first place with the Soviet Union was the first such Communist revolution. The Soviet Union had no one, the Communist Party in the [fol. 645] Soviet Union, rather, had no one outside the Soviet Union to help them whereas in our revolution here in the United States we had both the experience of the Communist Party of the Soviet Union and could count on the assistance of the Communist Party and of the Soviet Union in our revolution here in this country."

A. I recall during one of these meetings in the spring of

1950 Scales brought up the question of permanent revolution. Permanent revolution was defined by Scales as the concept that the Soviet Union and the Communist Party in the Soviet Union were not through with their job after they had achieved Socialism. In the Soviet Union they had a continuing obligation. He said that when the Soviet Union Communist Party had brought about a revolution and had brought Socialism there to the Soviet Union, they still were obligated under Stalin's teachings and under common sense, as he put it, to continue assisting the Communist Party all [fol. 646] over the world until they had overthrown the capitalist governments including that of the United States, that would threaten Communists, Communism and Socialism, unless they were overthrown.

Now I asked Scales, Does that mean that when the day of the revolution comes, Soviet Union is going to land troops?

Scales' answer to that was that as a practical matter the Soviet Union would not land troops at the commencement of the revolution, that the Communists here in the United States would have to start the revolution themselves. He pointed out that the Communist Party in the Soviet Union had learned through experience in China that direct Soviet Union guidance immediately in the form of leadership was not desirable. He said they sent a general over to China during the time the Chinese Revolution was taking place, and this Russian General that was sent over by the Communist Party resulted in having the troops completely routed, that Mao, the Chinese leader there in China had never been to the Soviet Union in his life at that period of time in 1950, but that instead the Soviet Union had sent political advisers over to educate him in the proper Communist technique, and had furnished them assistance through their military advisers and that sort of thing. He said that once the revolution was started, if it began to look as though the police power of this country would be [fols. 647-649] used against the working class in the Communist Party, then certainly the "mother country" as he called the Soviet Union, could not stand by and see that happen but would have to land troops to protect us.

Q. Do you recall at the present any other discussions, Mr. Clontz, during this series?

A. Yes, I had one brought to mind this morning reading over the question outline.

One of the questions that had to do with the difference in a union in the Communist Party. Scales taught that the difference, the great difference, was that the union could only see the next hill. He had previously told me the same thing, but he said that the Communist Party had a definite goal and a plan; they knew where they were heading for and that, therefore, they were able to guide the working class revolution better than a union or any other organization of that sort.

[fol. 650] Q. Do you remember about when that was?

A. It would have been approximately June of 1950. It was about the time I was preparing to be graduated from Duke Law School. At that time I had seen advertisements in the "Daily Worker" about the Jefferson School of Social Science. I pointed out one of the advertisements to Junius [fol. 651] Scales and asked him about the school.

Junius informed me that that was a school sponsored by the Communist Party of New York for Party members from all over the country and for people that were deemed to be good potential Party material. He then made the statement that he wished that some time I could go to the school.

Two or three days later I, having received the Government's permission to go to the school, announced to Scales my willingness to attend the Jefferson School of Social Science.

At that time he said that he would send for a catalog. He said, however, there were certain restrictions, that I couldn't simply send in an application to the Jefferson School and go to the school. He said that he personally was acquainted with all of the officers of the Jefferson School and that he would have to certify me to be a good Communist before my application would even be acted on. He said furthermore that I couldn't go up there under my right name, that I would have to adopt an alias, that no New York, that no Party members form the South or outside New York State ever attended the Communist School up there under their right names.

Finally, I asked him about the question of a scholarship

and he said, well, that he could arrange for me to get a scholarship where I would not be required to pay the dues [fol. 652] and other expenses in connection with the Party, with the school, and that if necessary he probably could arrange for the Party to take care of my housing while I was up there.

I indicated to Scales that I was willing to attend and filled out a registration blank for my attendance and mailed those off.

A. This is a photograph of my application for a scholarship which I filled out with Junius Scales' assistance. This picture was made in my presence by the Special Agent of the F.B.I. with whom I was then associated, on June the 20th, 1950. The same date I had received it from Junius Scales.

Q. What is the name of the applicant as shown on that [fols. 653-654] application?

A. The name of the applicant is Ralph Clayton.

Q. What is your middle name?

A. My middle name is Clayton.

Q. Does it have the name Clontz on it any place?

A. No. I had originally started to fill it out Clontz and Scales had me strike that out, when he explained to me that you couldn't go up there under your right name, you had to use an alias.

Q. Who suggested the use of Ralph Clayton rather than Ralph C. Clontz?

A. I don't recall. Junius and I discussed the matter. He said that it was customary to select your first name and some other name as the last name, and I believe I selected it since my middle name wasn't well known.

[fol. 655] Q. Now, as a result of the application and the recommendation that you say accompanied the application, did you receive a scholarship to the Jefferson School of Social Science?

A. Yes, I did.

Q. Did you go to that school?

A. Yes, I did.

Q. When did you go, Mr. Clontz?

A. I went on August the 5th, 1950.

Q. Prior to your leaving, were you given any further

instructions as to security or otherwise by the defendant, Scales, upon your arrival in New York and as to how to find the school, or any other information?

A. Yes. I was told by Junius that I should be particularly [fol. 656] careful around the Jefferson School of Social Science because the F.B.I would undoubtedly have that organization being watched, that I should be careful about people following me when I either went to the school or left the school. I was told that rather than have me simply go up and take courses at random, I'd been identified by Junius to two people at the Jefferson School who he said were members of the Party as well as officers of the school.

First was a Rosalie Berry, also known as Mrs. Abner Berry. She was the registrar at the Jefferson School of Social Science. The other one was Doxey Wilkerson. Doxey Wilkerson was the Director of Curriculum at the Jefferson School and also was the liaison officer between the Communist Party Headquarters in New York and the Jefferson School of Social Science. It was his job to see that the teachings of the Jefferson School reflected the Communist Party line as laid down by the Party in the National Headquarters.

Q. Well, will you describe what you found upon your arrival in New York and went to this school, and stating first where that school was located at that time?

A. The school was located, as I recall the address is 575 Avenue of the Americas. It was at 16th ond 17th Street about five blocks from Union Square in downtown New York.

I went in, identified myself to Rosalie Berry and was registered under my alias. I then was taken by her to [fols. 657-660] Doxey Wilkerson's office.

Now in order to get above the first floor in the Jefferson School, I found there were certain security regulations that had to be taken care of. No person went above the first floor of the Jefferson School without——

Mr. Rein: If Your Honor please, it seems to me, whatever regulations or anything they might have had in this Jefferson School are irrelevant in this proceeding. Certainly not binding on the defendant. I don't see what bearing they have on anything in this proceeding.

Mr. Stanley: If the Court please, that evidence is com-

petent for two or three things. First of all, we have at issue the aims and objectives of the Communist Party. This defendant himself says, made arrangements for this witness to go to that school. He told him to watch out for the F.B.I., he vouched for him, he sent a recommendation for him, he said he is personally acquainted with the leaders of the school, they were leaders in the Communist Party, he was familiar with the school and the structure, and he went there and as to what he found, I think undoubtedly this defendant is fixed with knowledge of what this witness might have expected to find.

[fol. 661] Q. Did you come back to North Carolina and report fully to the defendant, Scales, on what you saw, what you did, who you met, and the other details of that school?

A. Yes, I did. As a matter of fact I brought my class notes back that I had taken at the school and went over them with both him and Henry Farash. On my return from New York.

[fols. 662-664] Q. Now what courses were taught you up at the school, Mr. Clontz?

A. Well, on this particular occasion as I have testified——

Mr. Rein: Would the record show my objection to this testimony as to courses that he took, not in the presence of the defendant?

The Court: Yes.

[fols. 665-698] Q. Now after completing your three weeks at the Jefferson School, did you return to North Carolina?

A. Yes, I did.

[fol. 699] Mr. Rein: Can we have the place and time of this incident, Mr. Clontz?

The Witness: The best I can place it is several months after I had gone to New York. I have already testified, Counsel, I went to New York on the 15th of March of '51. This is two or three months later Mr. Scales came up.

* * * * * * *

The Witness: Scales related to me then the experiences he had been having with the F.B.I. in North Carolina. We discussed the matter of security. He said that the F.B.I.

had been following him around all over North Carolina, and that it had hampered his work. He said that Henry Farash had been forced to go underground and told about Henry Farash escaping from the F.B.I.'s surveillance.

He said that the Party had actually, that he and Farash had sold the Party car which was a '46 Oldsmobile that I had gotten them while they were in Durham, and had [fol. 700] traded that in on a '49 or a 1950 Pontiac. He said they wanted a fast and a powerful car so they could get away from the F.B.I. when the time came.

At that time Scales said that while Farash was underground, he did not know whether or not he would go underground. He said that, of course, if an emergency came up, or if war broke out with the Soviet Union, he would immediately go underground.

He commented that a friend of his, one James Jackson was a fugitive at that time from the F.B.I., and had proved to him that going underground was possible, that he could do it.

At that time I discussed with Scales what the general purpose of the Communist Party was in that particular period of time. He said that he and the Party had learned lessons from the experience of the Communist Party in Germany. He said that when Hitler had driven the Party underground and had outlawed the Communist Party that the Party communications had been all disrupted, that the Communist Party in this country was learning from the German Communist Party and that they were in the process now of setting up underground Party organizations including underground communications systems.

[fol. 701] He said that the Party was like an iceberg—made an impression on me at the time—a very small amount left visible on top and a vast underground network underneath. He said that, therefore, the two primary goals of the Communist Party were to attempt to influence or infiltrate—he didn't use the term infiltrate—large mass organizations, such as, he cited the NAACP, National Association for the Advancement of Colored People, and any other large groups to establish the Party's foothold in these organizations and at the same time to consolidate the underground apparatus.

At the same time I discussed with Scales my personal conduct as a Party member in New York. He promised that he would attempt on his next trip to New York to work out a liaison personally between myself and Communist Party Headquarters so that I wouldn't have to wait on him to get up to New York.

He said that while our original arrangements were that he or Farash were to come up once a month that obviously with the underground situation that wouldn't be possible. He said that meanwhile he was making Doxey Wilkerson my contact, that Doxey Wilkerson would direct my activities [fol. 702] as a Communist in the various Front organizations with which I was associated.

At that time I discussed with Scales the subject matter of these various courses and Scales was so impressed with the courses and the superiority in the teaching technique that he asked me whenever I heard a particularly valuable lecture or a particularly valuable speaker, he asked me to make notes on it and send those back to North Carolina for him to use down here in teaching other Communists down here. I actually——

[fols. 703-705] Q. Did the defendant, Scales, some time later contact you again in New York.

A. Scales contacted me again. I don't recall whether it was in New York or in Richmond, Virginia. At any rate Scales communicated with me some time in December of 1951. In his communication he advised me that he was going underground, that the Party had issued orders that in the future I must not use the telephone, the telegraph or the mails in communicating with him, that other means were safer, were slower but safer.

[fols. 706-713] By Mr. Stanley:

Q. When was this communication? I am not sure that I got that straight, that Scales told you he was going underground.

A. That was in December of '51.

[fols. 714-733] Q. Mr. Clontz, were the principles that were taught to you by the defendant, Junius Irving Scales, as the basic aims and objectives of the Communist Party

ever repudiated while you were an active member of the Party?

A. No, sir; they were not.

[fol. 734] Q. What was that date that you first went to the Jefferson School?

A. The date that I went to the Jefferson School was August the 5th, 1950, sir.

[fols. 735-750] Q. Then you returned, didn't see Mr. Scales at all in New York while you were at the Jefferson School; is that correct?

A. No, sir.

Q. During the 1950——

A. I didn't see him there during 1950 at the Jefferson School.

Q. Then you returned to North Carolina. When was that?

A. It would have been, three weeks after the 4th of August, be roughly the 25th of August or 26th.

Q. Then did you see Mr. Scales in the latter part of 1950, that is, from your return on to the end of 1950?

A. Yes. Several weeks after I got back from the Jefferson School.

[fol. 751] Q. That was the communication that said you should not get in touch with Mr. Scales by any means known to you; is that correct?

A. Well, not in so many words.

The message was that I should not use the—the Party had directed that I not use the telephone, the telegraph or the mails, then the cryptical statement, other means are slower but safer. That was the message, as I recall it.

Q. Was this communication typewritten?

A. I honestly don't recall, sir.

[fol. 752] Q. You don't know whether it was typewritten?

A. No, I actually don't.

Q. It was—was it signed?

A. I don't recall that. Customarily Scales would have simply signed it "J" or "J.S."

Q. Typewritten, might have just had initials "J.S."; is that correct?

A. Yes, sir.

Q. Do you have that communication?

A. I do not, sir.

Q. What have you done with it?

A. I don't actually recall. I would imagine that I furnished that to the Government in New York.

Q. I would like to see it.

A. I may have turned that over to Doxey Wilkerson, however, for this reason. I at least gave it to Doxey and asked him to get in touch with the Party and tell me what it meant.

Q. Previously you testified that you showed it to him.

A. Well, I handed it to him. Now I don't——

Q. Wasn't this a very important communication that you would naturally turn over to the F.B.I.?

A. Not if it would in any way cause the Party to be suspicious. You must recall——

Q. How would it cause the Party to be suspicious?

[fols. 753-821] A. If I had showed any reluctance to part with something of an incriminating nature that would. You have to never underestimate the enemy. Logically they would——

Q. Before you would show it to Mr. Wilkerson, however, you would copy it verbatim so you would make sure the F.B.I. would have it exactly as written, wouldn't you?

A. Either that or read it to them over the phone.

Q. But you may have turned it over to the F.B.I.? You are not certain?

A. I could have; yes, sir.

Q. I mean this supposition that you—Mr. Wilkerson may have taken it from you—was the supposition. You have no recollection that that occurred?

A. No, sir; I have no recollection either way. Either is conceivable.

Mr. Rein: I would like to see that communication, Your Honor, and I would like to ask the Government to produce it.

Mr. Stanley: The Government does not have the communication. If it did have it it would have gone in evidence in the Government's case. I can assure counsel we do not have that communication.

[fols. 822-824] Q. You didn't want to ask any questions to see whether or not Scales could make it appear to be sensible; is that correct?

A. That is not correct at all. I think I have answered the question.

Q. Well, I don't think you have.

A. As I stated before, a large majority of the Communist Party jargon seemed like idiotic babble to me, including this one conversation.

Q. I am not talking about including. I am talking about one conversation with Mr. Scales, not about a large majority.

A. All right. This one conversation seemed idiotic to me.

[fol. 825] Q. And that is the total conversation as you can recall, the one question you gave, and this one answer of Mr. Scales, and you can't recall anything else that was said either by you or Mr. Scales on the subject; is that correct?

A. That is all that I recall. That was what was outstanding in my recollection and is outstanding in my recollection with respect to that particular meeting.

I recall also his having given me some literature on that occasion, but that I don't think constitutes conversation.

Q. But aside—in the course of the two, three-hour conversation, you recall just this one question of yours and this one answer of Mr. Scales; is that correct?

A. That is correct.

Q. That is all you presently recall?

A. That is correct, sir.

Q. Scales in the course of this conversation was trying to convince you to become a member of the Communist Party; is that not correct?

A. You will have to ask Mr. Scales what his motive was. I am certain I don't know his innermost——

Q. Did you have that impression?

A. I had the impression that he was trying to interest me [fols. 826-922] in Communism and eventually entice me into the Party.

Q. He chose this method of stating the Communist Party aims, interesting you to become a member of the Communist Party?

A. As to whether he chose that method, again you have to ask him.

Q. That is what he did?

A. That and the other things that he did; that was one of the things that he did.

Q. That is the first statement he ever made to you as to the aims of the Communist Party?

A. It is the first statement I recall his having made; yes, sir.

Q. You said he did not make any statements at your first meeting with him. This is only your second meeting?

A. That is correct. I said I didn't recall his having made any statement.

[fol. 923] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Stanley: If Your Honor please, we were not requested by the Court to look at such a report to determine if such a report was in existence. I have not seen such a report. It was not in the purview of Your Honor's order, and the Government seriously objects to revealing to the defendant any report that it has.

The Court: Suppose we do it this way. Make the search, see if there is any report. There may not be any such report. If so, that is the conclusive answer. If there is a report, then let the Court see it and the Court will pass on whether or not it should be produced, after considering your objections and the demand for it.

Mr. Stanley: My associate, Mr. O'Donnell, tells me—and that I had no knowledge of this when I spoke to the Court a moment ago. We have been working on different matters over the week end—Mr. O'Donnell tells me that there is no such report.

The Court: All right, sir.

Now that concludes all discovery.

Mr. Rein: Except that I would like that statement to be stated to the jury, Your Honor.

Mr. Stanley: No, sir.

The Court: Why?

Mr. Rein: That there is no such report that this witness testified with respect to a communication which he received from the defendant in 1951, and in the files of the F.B.I.

[fol: 924] there is neitner any such communication nor any report concerning such communication. I think I am entitled to have that stated to the jury, Your Honor.

The Court: I think it best be raised by you, you still have Mr. Clontz on the stand.

Mr. Rein: He wouldn't know the answer, Your Honor.

The Court: I know, but let him be interrogated as to whether or not he made the report.

Mr. Rein: I have already interrogated him and he has said he did.

The Court: Well, then, I will let the United States Attorney make the statement that he has made a search for that report and does not find it, if you wish to make such a statement.

Mr. Stanley: If the Court please, in the absence of the jury I would like to say this: That we have been unable to locate any such report. That is what Mr. O'Donnell says. We are saying that in all fairness. We do stoutly maintain that this defendant is not entitled to see such a report even if one was in existence.

Now you recall the testimony of the witness that he received a communication, that he took it to Doxey Wilkerson, who was head of the school, to tell him what was in the report, or how to communicate with this defendant, in view of the fact that he couldn't use any of the known means of communication. I think I am quoting from substance [fol. 925] what the witness testified to, that Doxey Wilkerson in turn took it up with the National Headquarters of the Communist Party and told him in substance that he'd have to use a courier, something of that character, to communicate with the defendant, that that was the interpretation that the National Party put on this matter. Now the communication he said might have well been left with Doxey Wilkerson.

The Court: What was the contents of the communication?

Mr. Stanley: The contents of the communication, as I recall it, from the testimony of the witness, was something to the effect that in the future that he had gone underground and that in the future he couldn't communicate with him by any of the known means of communication. Mentioned,

I believe the witness testified, by telephone or letter or telegram.

The Court: That was a note from the defendant to the witness, Clontz?

Mr. Stanley: Some means of communication, as I remember the testimony of the witness. He said he wasn't positive whether it was a telegram or letter or some sort of note and it possibly could have been a telephone call.

Mr. Rein: No, it was a written communication because he said he had exhibited it. No question——

The Court: From the defendant to Clontz?

[fol. 926] Mr. Rein: That is Mr. Clontz's testimony.

Mr. Stanley: Well, Mr. Clontz can clear that up, but that he took it to Doxey Wilkerson and that he might well, if he exhibited too much interest in getting it back, whatever he left with Doxey Wilkerson, then it might indicate that he had some reason for wanting it back and that he might well have left it with Doxey Wilkerson. Now I think the defendant, if the statement is to be made in front of the jury, then I think the defendant should state whether or not he has contacted Doxey Wilkerson to try to get such a communication.

The Court: Practically, this is what you will have. The question will be asked Mr. Clontz again by defense counsel if he made any report and if he says he did, or has already said——

Mr. Rein: He has already testified.

The Court: Then counsel would then ask the Government to produce a report and the Government's answer will be that it made a search and the report is not available. I do not see any question of law there. It will just be a practical matter.

Mr. Stanley: Other than this, and we will not debate the question any longer. We just feel that the defendant has no right to make any demand upon the Government, and whether or not that indicates that if we did it, we should produce it, and we just think that is a——

[fol. 927] The Court: I would not take that as a concession or as a ruling on the question, but practically that is what is going to happen just as soon as the case starts again.

Does that take care of the discovery?

Mr. Rein: Well, I had other discovery motions with regard to reports generally, Your Honor, but I had intended to raise that after I was through with my cross-examination.

The Court: I think that would be more appropriate.

Mr. Rein: I think at this point, rather than at this stage——.

The Court: Suppose you let the witness resume the stand and bring the jury back.

(The jury returned to the jury box.)

(The witness Ralph C. Clontz, Jr. resumed the witness stand.)

Cross-examination (continued)

By Mr. Rein:

Q. Mr. Clontz, referring to your testimony with reference to communication you received from the defendant in December of 1951, communication with reference to not communicating with him by the ordinary means of communication, did you make a report on that to the F.B.I.?

A. As I previously testified, I do not recall specifically whether or not I made a report on this particular incident or communication.

[fol. 928] As I testified it was cutsomary during this period for me to furnish classified official reports to the Government, but it would be impossible for me to state as a positive fact that I either did or did not make a report to the Government.

Q. So if you previously testified in this case without qualification that you did make such a report, you now want to withdraw that testimony, Mr. Clontz?

Mr. Stanley: Object. The record will speak for itself. He is asking him inferentially if you did previously say so-and-so, now do you want to change your testimony. We object to that line of questioning.

Mr. Rein: My recollection of the testimony is that this witness had no doubt about having made a report on so significant a matter before this colloquy occurred, Your Honor.

The Court: To your knowledge did you make any state-

ment, earlier testimony, contrary to what you are now stating?

The Witness: No, sir; I did not.

The Court: All right. Then that will leave it to the record to speak.

Mr. Rein: Yes.

I would like to now ask Mr Stanley whether or not he is [fols. 929-950] able to find any such report in the files of the F.B.I. concerning this communication of December, 1951?

The Court: Have you been able to find any, Mr. Stanley?

Mr. Stanley: No, Your Honor.

The Court: All right.

By Mr. Rein:

[fol. 951] Q. When you were employed on a full-time basis with the F.B.I. was the suggestion, was the suggestion of the F.B.I. that you go to New York? Is that not correct, in March of '51?

A. Well, in answering your question, let me say that it was the suggestion of the F.B.I. that I go to New York at the time I went on the full-time basis.

Q. Well, that answers my question.

Now during the entire time you were in the Communist Party in North Carolina, how many members of the Communist Party did you personally meet? I am not talking about people whom Scales may have told you about, but people whom you personally came in contact with.

A. People I personally came in contact with.

Q. Yes.

A. I will have to name them for you?

There was John Meyers, Associate Professor at the University of North Carolina. Mr. and Mrs. Bernard Friedland.

Q. Do you mind if I take that down?

A. Not at all.

Henry Farash, Junius Irving Scales. Vera Lacob Scales. Gladys Meyer Scales. Laurent Frantz, a graduate student [fols. 952-974] at Duke University who worked for one of the professors there as an assistant.

Q. You can just give me their names.

A. Richard A. or Richard T. Koral, and his wife.

I will let you keep count for me.

Mrs. Laurent Frantz. Mina Abernethy.

[fols. 975-978] Q. Mr. Clontz, didn't the Communist Party sometimes express its position on force and violence as follows: "That what we claim would be as Communists was that we would be on the verge of achieving Socialism through the ballot, that the monopoly capitalists would immediately rise up in arms to defeat our goal of achieving Communism in the United States or Socialism through the ballot, and that then we would be forced to meet violence with violence."?

A. Yes, I have heard the Party state that, and that was explained to me by Doxey Wilkerson at the time we discussed it.

[fol. 979] Q. Did you ever hear him state—I believe you have stated, Mr. Clontz, in answer to my previous question—that the Communists were constantly stating to the public that they intended to achieve their aims by peaceful means? What I want to ask you, did you ever hear Mr. Scales say that?

A. Mind, Counsel, I was not the public to Mr. Scales. I was an undercover Communist.

Q. Did you ever hear him say anything other than to you?

A. No, I wouldn't say I had never heard him say that. [fols. 980-1009] It is entirely conceivable that he would have made that statement.

[fols. 1010-1012] Charles Benson Childs was called as a witness by counsel on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Stanley:

[fol. 1013] Q. Following the discussions with your English teacher in the spring of 1948, what did you do?

A. Well, some time thereafter, during the summer, or the early part of the fall, I noticed that there was a pub-

lication put out about a speech to be given in High Point by a person whose name was Mike Ross.

Q. Now who was Mike Ross at that time?

A. At that time Mike Ross was an organizer for a union.

Q. Which union; do you remember?

A. Yes, it was a furniture union.

Q. I see. Did you go hear Mike Ross speak on any occasion?

A. Yes, sir; I went to hear Mike Ross on that occasion, and later I heard him give several, maybe a couple, of talks, but after one talk, I went up and discussed with him his speech and had a little discussion with him then.

Q. Now following that discussion with Mike Ross, what did you do in regard to your English teacher, if anything?

A. Well, through Mike Ross I met several people who [fols. 1014-1062] I later learned were with the Progressive Party and I returned to the high school and discussed what these people—discussed my conversations with these people—and she told me that, I mean, she didn't tell me in our discussions—after we had our discussions I decided, after considering it for awhile, that what these people were doing, I thought that it was in the interest of my Government, I thought that their views were dangerous, and I went to my Government and I told them what was going on, and I volunteered to give them any other information from that day on.

Q. What representative of the Government did you volunteer to disclose this information to, what branch of the Government?

A. That was the F.B.I.

Q. Then did you thereafter, after making your initial report to your Government, to the F.B.I., did you thereafter continue to associate with the individuals with whom you had been associating, and further your activities in that direction?

A. Yes, sir. I continued supplying information to the F.B.I. from that date, and also continued associations with people who I met through Mike Ross.

[fol. 1063] Q. All right. What else happened there, if you remember?

A. Well, in his explanation of the way that the Com-

munist Party should stay in industry, he pointed out that in the next presidential administration, that there would be an economic crisis and that five to six years later, that things in this country will come to a head, and he said, "Now, if we go back to school and lose our contact with mass organizations, then we would have to sit back and wait on the Red Army to liberate us."

Q. Now was anything said about any publications that you had seen over at Western Electric?

A. Yes, sir; the Western Electric Company has a book rack service, and they put on these booklets each week or every two weeks, they change them, certain little pamphlets which employees can pick up. Now one of these [fols. 1064-1065] I took with me and showed it to Scales. And the title of this book was, "Our Own Communists Can Cripple Us", and Scales said at that time after he had looked through the book, that we should keep the names of these people and shoot them some day.

[fol. 1066] Q. All right. What happened there?

A. At that meeting, I mean we went into the restaurant and he explained to me that plans had been made for the communist Party School which he had discussed with me at a meeting in the park, and he gave me a list of materials which I was to bring with me to the school and explained that throughout the school which would be about a week long, that I was not—I could not have any mail coming or leaving while the school was being conducted. There would be no telephoning. There would be no persons permitted to leave the school before the school was over. And he also cautioned me that I was not to tell any other Communist Party member that I had been invited to attend this school, that in case I missed the club meeting that I was to just explain that I had been in some activity.

[fol. 1067] Q. Did he give you the date this meeting would be held?

A. Yes, sir. It was to start around on August the 9th or 10th.

Q. Now at that meeting did Scales tell you what would be necessary for you to bring along with you?

A. Yes, sir. Scales gave me a list of things which I was to bring with me and explained that certain literature on

the—I mean that I was to bring certain literature and other literature which I would need would be supplied by the school.

(The Clerk marked a slip of paper as Government's Exhibit No. 42 for identification.)

Q. I hand you what has been marked for identification as Government's Exhibit No. 42 and ask you what that is?

A. This is the list written in my presence by Junius Scales. I was instructed to bring these things with me which he has on the list.

Q. Will you read the list.

A. Equipment——

Mr, Rein: May I suggest that you first offer it in evidence?

Mr. Stanley: We do offer it in evidence.

Mr. Rein: I have no objection.

The Court: Let it be admitted.

[fol. 1068] (The Clerk so marked a slip of paper as Government's Exhibit No. 42 in evidence.)

By Mr. Stanley:

Q. Will you read from the list.

(The witness read the list marked Government's Exhibit No. 42 in evidence.)

Q. Now is all that information you just read in Junius Scales' own handwriting?

A. It is.

Q. And was done in your presence?

A. Yes, sir.

Q. I hand you what has been introduced in evidence as Government's Exhibit 12, "History of the Communist"—"History of the CPSU" and Government Exhibit No. 41, "Ten Classics of Marxism", and ask you whether or not they are the books that Scales asked you to bring up to that school for studying?

A. These are the two books which he has on the list to bring to the school.

Q. Did you take those books with you?

A. I didn't have the copy of "Ten Classics of Marxism" but I did have the copy of the "History of the Communist Party of the Soviet Union".

Q. Did you take it with you?

A. Yes, sir.

Q. Did you have made available to you at the school [fol. 1069] "Ten Classics of Marxism"?

A. Yes, sir.

Q. Was that one of the regular courses of study?

A. Yes, sir.

Q. Now the information written on the bottom of this receipt that you said, or list of articles to take to the school written by Scales, there is some writing down there in ink. Would you tell us what that is, who placed that on there?

A. This writing in ink, 8/12/52 RJ is my signing of the date which I sent this to the Government. RJ stands for the initials which I used in reporting to the F.B.I. They stood for Ralph Jones, and I have written also "Received from Junius Scales on 8/4/52".

Q. Now did you thereafter go up to this school?

A. Yes, sir; somewhere on the 9th or 10th of August. I was picked up from the First Baptist Church in Winston-Salem by George Van Camp.

Q. Who is George Van Camp?

A. George Van Camp was a member of the Communist Party and also a member of the club to which I belonged.

Q. All right.

A. And Junius Scales and a man who was introduced to me as Abe.

Q. As who?

A. Abe.

[fol. 1070] Q. Who introduced you to him as Abe?

A. Scales.

Q. Did he identify who Abe was?

A. He later identified Abe as the representative of the National Committee of the Communist Party to that school.

Q. All right. How did you go over to the school?

A. Yes, we drove to the school in George Van Camp's automobile.

Q. And who was in the automobile when you drove to Winston-Salem over to the school?

A. Scales and the man who was introduced to me as being from the National Committee.

Q. Where was this school held?

A. The school was held near Walnut Cove, a farm. The farm belonged to the Binkleys.

Q. Now will you describe the physical location of the house on this farm with reference to public highways and access to the house and so forth?

A. Well, to get to the farm it is—it was necessary to go off the highway for a considerable distance and the road on which we traveled was very rough. I mean we had—the growth was near the edge and it was—it was very, a crude road, and then we drove past a house and then we had to go down another road to get to the farm. The house on the farm was fairly small and the place where we stayed was out in the woods where we had to cut down trees and put [fol. 1071] up canvas-like material to keep the rain out, and we set up Army cots under that canvas and that is where we stayed.

Q. Where was the school held? What kind of a building?

A. Well, the school itself was held in—out where we slept, inside the house, and also outside the house.

Q. And tell us who was present at that school and identify each one, or so many of those present that you can now recall?

A. I recall that there were approximately fifteen people at the school. Those at the school in addition to myself was George Van Camp, Jerry Van Camp——

Q. Will you identify these individuals as you go along?

A. Jerry Van Camp I had never met before but I later learned he was a member of the Communist Party and Scales had told me before that only members of the Communist Party would attend this school.

Q. All right.

A. And George Van Camp, who was a member of the Communist Party and club of which I was a member in Winston-Salem. Jerry Van Camp, who I knew to be a member of the Communist Party. Betsy Tyree, who either at that time or later married George Van Camp. Nat Bond from Durham and two women from the state of Virginia. There was a person who was introduced as Don who was

[fol. 1072] later told to me by Scales is the District Organizer for the state of Virginia, and there was also Mrs. Binkley, Mr. Binkley, Viola Brown from Winston-Salem——

Q. Who was she?

A. She was associated with several organizers there in Winston-Salem. And at one time for a short time Bill McGirt and Warren Williams; both of those were from Winston-Salem, were at the school.

Q. Now did the parties in attendance at that school use their right names?

A. No, sir; each person was assigned a name because of security restrictions, and the person who at one time had been introduced to me as Abe was later introduced to me at the school as Don.

Q. Did you have an alias?

A. Yes, sir.

Q. What was your name at the school, Mr. Childs?

A. My name was Phil.

Q. Now did Mr. Scales explain to you the purpose of this school?

A. The purpose of the school, as I understood it, was to——

Mr. Rein: Mr. Scales explained it?

The Witness: Mr. Scales explained. Mr. Scales explained that the purpose of the school was to give special [fol. 1073] training to outstanding Communist Party people in Virginia, North and South Carolina Districts.

By Mr. Stanley:

Q. What was Scales—what did he have to do with the school, his relationship?

A. Scales was the director of the school.

Q. Did Scales have a Party name at the school?

A. No, sir; they didn't give him a Party name because they said he was so well known that they knew who he was.

Q. Now can you tell us how that school was organized?

A. Yes, sir. The school was organized into three groups. I mean the students were organized into three groups and the staff of the school, certain members of the staff were also members of the group, sort of a guiding thing for each

group, and each group had a group leader who was appointed by Scales.

Q. Who was in your group?

A. My group consisted of George Van Camp, a lady from Virginia, Viola Brown, and Junius Scales and myself.

Q. Did you hold any office in your group, Mr. Childs?

A. Yes, I was the head of my group.

Q. Now how long was that school in session?

A. About August 9th or 10th, started about on a Saturday or Sunday and continued through to the next Sunday. [fol. 1074] Q. Did they have a set agenda, that is, to meet at regular hours in the morning, evening and night, or was that an irregular—can you tell us about that?

A. Yes, sir. The school had a regular agenda that would meet of the mornings where it would receive assignments, reading assignments and any other assignments, and then after it broke up into the groups and then individual groups would discuss and read these things, the assignments, and then the school would reassemble and discuss the assignments. Then in the afternoon the same process.

Q. How about the evenings?

A. Well, in the evenings they usually—was a special lecture given by some person attending the school.

Q. Mr. Childs, while you were there did you make notes of what happened at the school?

A. Yes, sir; I kept notes of the school.

Q. Would you look at those and tell me what they are.

A. These are the notes which I kept throughout the school.

Q. All these notes in your own handwriting?

A. Yes, sir.

(The Clerk so marked the papers as Government's Exhibit No. 43A, B, through H for identification.)

Q. Mr. Childs, I hand you what has been marked for [fols. 1075-1076] identification as Government's Exhibit No. 43A which purports to be your notes covering the Sunday and Monday session of that school up there and using those notes to refresh your memory, will you tell the Court and jury what occurred at that school on those days? [fol. 1077] Q. Go ahead.

A. On the first Sunday and Monday of the school——

Q. Now let me interrupt you there. Can you remember the dates? You said it was sometime in August of 1953, if I'm——

A. '52.

Q. 1952?

A. Yes, sir.

Q. Do you remember the date in August that the first session of that school was held?

A. It was on August the 9th or 10th. One of those days.

Q. All right. Go ahead.

A. When we first went to the school there was an agenda prepared for us which explained to us the way the school would be conducted.

Now the first part of the agenda would consist of detail work, such things as preparing breakfast for all the people [fol. 1078] there and washing dishes. That would be the detail work. And then the second thing would be a program of sessions which would be broken up into a theory—I mean a study of theory among the students. Then there would be a formal study of the theory in the groups, and an individual analyzes the theory in relationship to his or her work and means of improving this work. Then there would be a collective discussion of theory and work in which the whole school would reassemble and discuss the theory in relationship to the work which the people were doing, and at the conclusion of this group, of this whole school discussion, the conclusion itself was in the form of what was to be done in each individual work, and the work of the Party.

Then there was a criticism and self-criticism of what had taken place at this meeting.

Now for Sunday and Monday there was an assignment from the "Ten Classics of Marxism" from pages 200 to 229. Then later an assignment was Lenin's "Imperialism", Chapter Seven, pages 88 to 98 and an article by Leon, pages 212 to 215, Sections from "Political Economy", pages 203 to 204, and pages 167 to 170 from the "History of the Communist Party of the Soviet Union".

In connection with each assignment generally for each day there was a problem given. The problem consisted of a question or a statement which the Communist Party

[fol. 1079] would expect an American person to propose, and that we would take this problem and analyze it and fix an answer for this particular problem, and in this particular lesson the problem which was assigned was this:

We have to stop Communism, the main danger. We are fighting for freedom here and abroad against an aggressive Soviet imperialism. Now our purpose was to take this question and analyze it on the basis of what we were learning and be able to give an answer to the people who asked such a question.

The Court: What was the question?

The Witness: We have to stop Communism, the main danger. We are fighting for freedom here and abroad against an aggressive Soviet imperialism.

By Mr. Stanley:

Q. What did I understand you were to do with that problem?

A. We were to take that problem and on the basis of our teachings and understanding we were to formulate an answer whereby it would not—we would point out the fact that Communism was—or formulation of answer to this question was, to turn the question around and point out that Communism was really not the main danger, that there was another main danger in the United States and as far as we are fighting for freedom here and abroad was concerned, we were to explain that the United States really is [fol. 1080] not fighting for freedom here nor abroad; what it is fighting for is imperialism, imperialistic expansion of the United States.

And the section here against aggressive Soviet imperialism we were to explain to the people who asked this question, that it is really not Soviet imperialism, it is not the Soviet Union is not aggressive—that it is really the United States which is aggressive and which is imperialistic.

Q. Now what day was that discussed?

A. That was discussed on Sunday and Monday.

Q. All right. Now when you go to Tuesday, will you go to your Tuesday meeting.

A. The Tuesday meeting consisted of first five assign-

ments for reading. The first assignment was Lenin's "State and Revolution" the first three sections of the first chapter. The second reading was "The Nature of Capitalism", pages 80 to 87. The third, which is an alternate was "Twilight of World Capitalism" by William Z. Foster, pages 53 to 59. The fourth assignment was pages 778 to 785 from "Political Affairs" issue of the 1948 convention. The fifth assignment was from the "Ten Classics of Marxism", "Foundations of Leninism", pages 47 and 51 and 57 to 60—47 to 51 and 57 to 60, and in connection with these assignments, there were four problems, and these problems, like the others, were problems or questions which people would ask of Communists.

The first problem was this:

[fol. 1081] Is one country indivisible with liberty and justice for all? We have freedom of speech, press, assembly and worship and we vote for the government of our choice. Now in explaining to a person who asked that question, we, as Communists, were to point out that as far as one country indivisible, we were to point out that it is really a country composed of classes and the fact that the class division is ever between the workers and owners and the members of production, that within even these divisions of workers and owners, there is division among the working class, such as, the Negro and white division, and among the unions and the A. F. of L. and the C. I. O. and independent unions.

And also in the second part so far as liberty and justice for all is concerned, we were to point out the fact that the United States Government controls the courts, that so far as real justice through the courts is concerned, we were to point out that the Communists do not receive justice in courts, the Negro people do not receive justice, the trade unions' leaders, the working people, and we were to discuss the contrast between sentences imposed upon working people and the rich people for the same offenses, and also we were to—as reference to the remark, we have freedom of speech, press, and assembly and worship—to first, so far as freedom of press was concerned we were to point out that the capitalists want it, owns the press, that the fact [fol. 1082] that the letters to the editors are chosen by the owners and the publicity given to the Progressive Parties,

national conventions—now as to freedom of assembly, we were to tell the workers that the public assembly halls would not be rented to any Communists for Peace Council.

In contrasting that, there is not freedom of worship, we were to point out the bombing of Jewish churches and the fact that Negro people were not permitted to attend white churches, and as far as we vote for the government of our choice, we were to point out poll tax restricts voting, that the presidential nominees take place in smoke-filled rooms.

And the second problem assigned on that day was this one:

If a few Communists are so revolutionary and want to establish Socialism, why did you hide behind the Civil Rights and what you call Bourgeois democracy? Now in our answering that question, we were to point out that the Communist Party is really not trying to destroy the Bill of Rights, that it is trying to save the Bill of Rights, and that it is not standing behind the Bill of Rights, that it is standing in front of the Bill of Rights, and in fact, want to tell these people that the Communist Party wants an extension of the Bill of Rights; and then the exploitation of the working class by the capitalists, and we are to point out that the Bill of Rights has been denied to the people through a [fol. 1083] lack of E. P. C., through the enactment of the Taft-Hartley Act and the Smith Act, and that the Communist Party must try to extend these Bill of Rights, talking with the people.

Now the third problem is this country Fascist? Now is Fascism developing in the United States? How? Illustrate with several examples close at home. In answering this question, we were to point out that this country at the present time is not Fascist because under Fascism the Communist Party could not exist, so we were to tell them that Fascism does not exist now but the way that we were to prevent the development of Fascism was to try to in one example, to try to—in the alleged persecution of the Communist Party.

The fourth question was Why can't American capitalists go to the U. S. S. R. and distribute a pamphlet attacking Socialism? This was the last problem and our discussions led to these answers, that we were to point out that the

contrast between workers' positions under capitalism and the dictatorship of the Proletariat, which is the Soviet Union, and also trying to justify that Communism—Communists do not allow capitalists to go to the Soviet Union and attack Communism. We point out that unions do not permit bosses to attend union meetings.

Q. Did they have any discussion about whether the worker class was better off in Russia today than they were in this country?

[fols. 1084-1086] A. Yes. The position of the Communist Party has always been——

Mr. Rein: Objection. The question is whether there was discussion at this school, not what the position of the Communist Party——

The Court: Go ahead.

The Witness: Yes, sir. There was a discussion of the contrast of the position between the working under capitalism in the United States and Communists, which means the Soviet Union. They pointed out the conditions under capitalism were far worse and that it was only in the Soviet Union where the workers have real freedom.

[fol. 1087] Q. Mr. Childs, at the recess adjournment yesterday, I believe you were testifying relative to the program at the school up near Walnut Cove. As I recall, you finished your testimony in regard to Tuesday. Now will you tell us what happened at that school on Wednesday?

A. The Wednesday session had readings from an article by Gus Hall, pages 12 to 24. Article by Pettis Perry, White Chauvinism, Struggle for Peace, and there was three problems assigned for discussions in the groups and with any collective discussion of the whole school.

Q. Let me interrupt you there and ask you who Gus Hall was.

A. Gus Hall was affiliated with the National Committee of the Communist Party.

Q. Who was Perry?

A. Perry also was a functionary of the Communist Party.

Q. That is the National Communist Party of the United States?

A. Yes, sir.

[fol. 1088]. Q. All right. Go ahead and relate the problems that were given you and the discussion of the problem?

A. The first problem was this one: What makes our approach, referring to the Communist Party, approach to Negro question, different from that of liberators and social democracy? Illustrate from experience close to us. Well, in our discussions of that, pointing out the difference between the Communist Party approach and liberal approach to the Negro question, was that the Communist Party does not look upon the Negro question as a question of a minority group, in this country, that it looks upon the Negro question as a question of a Negro nation, meaning by nation that which is defined by Stalin to constitute a nation and whereas the liberal says that it is just a matter of democratic rights being granted through legislative action for the Negro people. The Communist Party takes the position that there is not just a minority race, that it is a nation, and using Stalin's definition of a nation, then they justify that this does constitute a nation.

Now in Stalin's definition of a nation which we discussed at this school, Stalin said that a nation is — historically evolved stable community, and that the Communist Party points out that there is within the South a historically evolved community of Negro people.

Another thing which Stalin used in his definition of a nation's language, they have the English language terri-[fol. 1089] tory. In other words, in order to have a nation that these people must have been centered or concentrated in a particular geographical location. In this case the Communists look upon this territory as the Black Belt of the South, which means that the Negro nation is concentrated in Virginia, North Carolina, South Carolina, and down throughout the South, and that the Communist Party's position on that is that since meeting these other requirements, such as, economy—in other words, within Negro communities you have a separate economic setup, and also psychological make-up in that the Negro people have an entirely different psychological make-up to the white people of the South, and the Communist Party's position that since the Negro nation in the South does constitute a nation from Stalin's definition, then these people have the right to set

the termination or setting up an entirely separate nation in the South because of Stalin's definition.

But they point out the liberals could not take this position. They take the position that only what we call constitutional rights, that the Negro people in the South should be given these and not an entirely separate nation setup.

And also in other Communist work, it is pointed out that the Negro nation in the South, although it does have the right to—what Lenin called self-emancipation or self-government, that this will not come about under capitalism, [fol. 1090] but it will only come about that they will have that right under Communism.

Another problem discussed on that day was this one:

Negro workers have the prime responsibility for tearing down the curtain separating Negro workers from white workers. How would we explain our formulation to a white worker? This problem was formulated into—in order to point out that it is not the responsibility of Negro workers to tear down the segregation in the South, that that is the responsibility to white workers in all industry.

The last problem discussed as: How would you explain to a Southern white worker that this, the struggle for Negro rights, is part of the fight for a better life for himself?

In answering this question or explaining to a Southern worker, the relationship between his rights and his fighting for rights in the Negro nation, is that in the South through exploitation of the Negro people, by paying them lower wages than the white worker, the capitalists intend to divide the working class and at the same time by paying the white worker just a little bit more money, it gives the white worker a feeling of superiority which the Communists claim will tend to keep a division within the South.

Q. Did that cover the principal topics discussed on Wednesday?

[fol. 1091] A. Yes. Covers about all we covered Wednesday.

Q. Will you go to Thursday and tell us what happened on that day.

A. Thursday's discussion started out with a historical analysis of the Communist Party of the Soviet Union.

Here it was pointed out that there was a new type of

Communist Party formulating the Soviet Union in 1903. It was formulated through strengthening units of the Communist Party, Soviet Union. It disposed and dispelled decisions, elements of the Communist Party, and through its application of Marxist theory and development of Marxist theory it won a large number or the masses of the Soviet Union to its side.

And it also explained that the Soviet Union defeated invasions in fourteen nations—that was referring to the invasion immediately, a few months after the revolutions in 1917—several countries, including the United States, sent expeditionary forces into the Soviet Union and they said that the Communist Party defeated invaders in these fourteen nations and that through Communism the Soviet Union became a modern industrial and agricultural nation and in reference to the Second World War, it pointed out that the Soviet Union defeated Fascists, a fact, in the main, singlehanded. In other words, the Soviet Union was primarily the defeater of the— or victor in the Second World War.

Q. What countries did it refer to when it told you at [fol. 1092] that school that the Russians singlehandedly defeated the Fascist nation? What nations were they referred to?

A. All the Fascist nations, axis, allies, and pointed out that today the Soviet Union is well on the way to building Communism.

Now, then, there was a discussion on our own Communist Party in the United States. In this discussion it was pointed out that our primary task is to Bolshevise, bring about Bolshevism similar to that which the Soviet Union did in developing its Communist Party.

And we also discussed weaknesses which will, might tend to lessen our ability to Bolshevise the Communist Party and these were Bourgeois backgrounds. In other words, several Communist Party members are from middle class or families which were relatively well-to-do, and that in the Communists' eyes a hindrance, is a hindrance to becoming a great Bolshevik.

And also we discussed that the Bourgeois thinking on the democracy—in other words, the present thinking of the American people on democracy is what the Communist

Party considers Bourgeois thinking in that they believe that the rights of workers are protected under the Constitution and the present United States Government. The Communist Party considers that is an incorrect approach to the question of democracy, that Bourgeois democracy is not what the Communists strive for. It is what the Communists strive for—a Socialist democracy, which I [fol. 1093] mean—throughout, using the term Socialist—and Communist, they relatively mean the same thing to a Communist.

And then we pointed out we must understand that the purpose of the Communist Party, the rod and historical position, is that it is the vanguard, that it is the first attack of the army. In other words, that it leads the working class to fulfilling its goal, which the Communist Party defines as being its goal.

And several other weaknesses which were discussed then was that the Communist Party did not lead a mass struggle for the American troops to get out of Korea when the Korean War first started. In other words, the Communist Party should—they attempted—but they did not succeed in getting a broad mass movement on the part of the American people in trying to get the Communists—I mean the American—troops out of Korea when the war first started.

And at the same time they were letting the veterans' committees' work follow up. At that time they were trying to infiltrate the different veterans' organizations in order to acquire roles of leadership in these organizations so they could guide the policy. And also members of the Communist Party, members are mainly middle class and pointed out, we need the Communist Party, the Communist Party needs to get these people in industrial concentration and what was meant by industrial concentration was that [fol. 1094] the Party needs to concentrate its members in industry and not in such fields as education or the professions.

Another thing in relation to the industrial concentration was that the Communist Party Clubs might consist of four to five members or even less, that the composition of these clubs should be such that the Communist Party

members in the same plants should be members of the same club; that would enable the Communist Club to formulate an influence better in those plants, and if it was not possible—in other words; if there were not sufficient members in a particular plant, that the people in the same industry, like in automobile or steel or in North Carolina textiles, people working in different textile mills should be in the same club because that would improve an analysis of particular problems related to textile workers.

And another thing which, in relation to this club composition and industrial concentration was evaluating work in trade unions in order to combat opportunism. Opportunism is to the Communist Party, is that taking advantage perhaps even for personal advancement without considering the over-all relationship between what should be done and the goals of the Party at that particular period.

Another was wavering, trying to correct leaning to one other side. In other words, failing to take a definite [fol. 1095] position on a problem or situation which might arise in connection with any work.

Also discussed the dues, literature and press and pointed out that dues to the Communist Party should be paid promptly, the literature should be distributed and the press refers both to the "Daily Worker" and any other publications of the Communist Party.

The second main topic in this was the discussion of criticism and self-criticism in the Communist Party.

The Communist Party takes the position that only through self-criticism in which a person analyzes the work which he has done in relation to the, what the goals of the Party were at that particular time is fulfillment of those goals and whether or not they were fulfilled and also errors in fulfilling those goals.

For example, if a club sets a particular goal for a person or a duty, then that person when he comes back, he has to report whether or not he has fulfilled that responsibility to the Communist Party, and if he has not fulfilled it, then it is his responsibility to stand up in—not literally stand up—in front of the group—but to the group explain why it was not fulfilled and his weaknesses and how he expects to correct those weaknesses, and in addition to a self-

criticism, the other Communist Party members of the club or whatever organization he belongs to, is also responsible [fol. 1096] for pointing out this person's weaknesses in failing to carry out assignments.

At the same time they take the position that the person who is being criticized should first be told his good points so that he will be in a more receptive mood for a criticism for failing to live up to responsibilities.

Now in this criticism the Party says that there are certain things which should be taken into consideration. In other words, the things to take into consideration are the forces available to the Party in that situation and that what this means is that in a particular plant, if the Party does not have sufficient number of Communist Party members to influence, say, a particular policy, then the Party should not, shall we say, quickly criticize for not having that policy carried through, but you have to consider what forces are available to that party in that situation.

Another thing was to discuss in criticism what the Party has done in past situations. In other words, what that means was, What has the Party been able to do in the past in relation to these problems and the forces which they had available and the other aspects of criticism was, What was the objective situation in which this was accomplished. In other words, what was the conditions under which these other things which the Party has done in the past were accomplished? In other words, perhaps the change in historical conditions of the country or changes [fol. 1097] in the situation in the plants. Say that perhaps there is a change though one situation there might not be a labor organization and the next—the next stage perhaps there is a labor organization. In other words, we have to evaluate things in relation to the forces and the situations which are available at that particular time.

Another thing we discussed on improving the Party was organizational looseness in failure to carry through an assignment. Well, this stems back through the purpose of criticism and self-criticism. In other words, to evaluate what the person has done and try to correct his failure and evaluate, why he did fail to carry out the assignment.

Another thing which in connection with this first dis-

cussion was liberalism in the Communist Party. In other words, the Communist Party does not take the position of liberals in reference to anything, but the Communist Party takes the position that it will use certain liberal movements or certain liberal policies or organizations in order to advance and use these organizations for the ultimate end of the Communist Party.

And in connection with this, we had an assignment from "Foundations of Leninism", pages 109 to 117, 119 to 124, and in connection with this reading and the previous discussions which were assigned this problem to discuss in the clubs and then come back in the school and have a [fol. 1093] general discussion of what each club could make to help solve this problem.

This was the problem: What proposal can you make to your group which will serve to Bolshevise and strengthen our Party?

Now in the club of which I was a member, we pointed out three main things which should be considered. First was the over-all machinery on hitting hot issues, lack of quick response to communication. What this first problem meant was—I mean methods whereby we should Bolshevise our Party—was that in the case of the Korean War which was a hot issue, when it first started, the Communist Party should have been in a position to have facilities available to it for putting out leaflets or any type of publication which it wanted to help bring about public opinion on that issue at that time which was the Korean War.

Q. Mr. Childs, may I interrupt you at this point? You stated that you had readings from "Foundations of Leninism". I show you what has been introduced in evidence as the Government's Exhibit No. 5 and state whether or not that is the book you referred to that you were giving readings from on this morning.

A. Yes, sir. This is the book "Foundations of Leninism", Joseph Stalin.

Q. I hand you what appears to be an identical book and [fol. 1099] ask you if you can identify the book that I hand you?

A. This is the book that I took with me to the Communist Party School and used throughout the school. It is identical to this Exhibit No. 5.

Q. All right. You may proceed.

A. A suggestion from our group was the role of vanguard in plants attacking politically white chauvinism and discussed that—what this means, attacking politically white chauvinism, is trying to get the white worker to break down the barriers of segregation in industries.

Then the school reassembled for the total suggestions on how to Bolshevise the Communist Party, and in all there were twenty recommendations made.

The first one was to bring good and close attention to criticism and self-criticism, which I have discussed.

The other was to not gloss over opportunism. The third one was application from day to day all aspects of our life or understanding of Marx, Lenin and Stalin, and what that means, that is that in conversations with people in factories, plants or wherever we happened to make them, any day-to-day event which might come up, we should interpret that event in relation to Marx, Engels and Stalin.

And it was pointed out, points out left sectarian errors and these left sectarian errors are the theories discussed by Lenin in "Left Wing Communism". And what that [fol. 1100] means is that the Communist Party does not take the position, the only, the policy of the Party can be achieved through the Communist Party. In other words, for a particular period perhaps, say, ending the Korean War, then the Communist Party should try to cooperate with other organizations in order to bring about an end to the Korean War or any other goal which the Communist Party might have at that particular time. What this is—a tactical maneuver in order to get support of whatever the Communist Party might happen to be at that particular period.

Over and underestimating militancies of workers. What that means is determining whether or not the workers at a particular period are willing to do certain things for whatever a certain program of the Party might happen to point out at that time. The Communist Party at the same time should recognize and appreciate its role of the vanguard of the working class. Now being the vanguard of the working class, the Communist Party says it does not follow the working class, that it leads the working

class, and how does it lead the working class? Will be pointed out later and be pointed out it leads the working class to acquiring infiltrating roles of leadership in any organization which it can, and that is why the Communist Party considers not only from that standpoint, from also, from that standpoint that it is the only party which is armed with the theory of Marx, Lenin and Stalin, and, [fol. 1101] therefore, is the only organization which is capable of leading the working class.

And we will discuss the organization to hear issues from their heart and the real meaning of security. The meaning of security means that the Communist Party considers security, that is, being careful, that the activity of the Communist Party is not known to the F.B.I., and that no stool pigeons or agents of the F.B.I. are able to infiltrate the Communist Party and learn how it operates. In strengthening our ties with working people—that goes back to the application of Marx, Lenin and Stalin—to day-to-day activities, and also trying to infiltrate organizations and acquire roles of leadership.

The Party is first. The next thing discussed was study of theory and the basic theory in the Communist Party has been the works of Marx, Lenin and Stalin, that their works are the basic theory on which all final decisions are made and that we, when anything comes up, that a question of a policy of a particular period, perhaps it might be adapted to a particular period—but in the final analysis, it is always made on the basis of the works of Marx, Lenin and Stalin.

Another con ideration was that as Communist Party members we were to remember at all times that the Communist Party always comes first. What that means is that members of the family, if you have a member of the family which is rather hostile towards Communism, well, that is [fol. 1102] relatively too bad because the Communist Party comes first. The individual desires, if a person wants to work in a particular location or go in a particular location, he must subject himself to the discipline and directives of the Communist Party. In other words, it is not up to him. The Communist Party will do all within its power to convince this person that the goal, that the assignment for

that particular person, perhaps the person does not agree with the plans, the person does not even want to do it, but the Communist Party says that the Party comes first, that each person's life must be based on the fact that he or that person is serving the Communist Party.

And in connection with this it was pointed out that we are not making sacrifices. In other words, in following directives of the Communist Party, doing things or working at a particular job or going to a particular place, which we might not like, that we are not making sacrifices. We are making a contribution. This contribution is being made to the final victory of Communism. Not only—and this final victory of Communism is the establishment of Communism in the United States.

In connection with the—directly related to this—was the discussion of factionalism. In other words, the failure to carry out the decision of the majority in higher organs of the Communist Party. Which means the failure to [fol. 1103] carry out decisions of the higher organs is that in the Communist Party all clubs and all divisions of organizations in the Communist Party follows what is known as democratic centralism in that all final authority, all final directives comes from the higher organs of the Communist Party. A club might make a decision in reference to a particular policy or assignment for a particular individual, but the higher organ of the Party can overrule that decision and the club will have to carry through its assignment of the higher organ.

The next thing discussed in trying to Bolshevise the Communist Party was to have more educational studying in both clubs and in a formal school, and also a lack of understanding the main line or deviating from the main line. The main line means the Communist Party position at that particular period in which the line was formulated.

In other words, a particular time the Communist Party might say that we believe in peace. Well, that then—although in readings of Marx, Lenin and Stalin, they clearly point out that the use of force and violence and the combining of illegal and legal means in trying to overthrow the Government—well, at the particular period then they might say, Well, we do not advocate that and that is the main line for that particular period, and in explaining

our policy to other people we should explain that that is the main—that that is the position of the Communist Party whereas we understand, Communist Party members, that [fol. 1104] the main line will change from one situation to the next, but the ultimate goal of the Communist Party always remains the same.

And in our struggles we should adapt a feeling of comradeship with other Communist members, and it was again repeated about the changing the composition of Party clubs in heavy industries, and specifically in this state on the basis of textiles and tobacco, that is, the concentration for the state.

One thing, next to the last one, was self-study, that a person should read the classical works of the Communist Party, Marx, Lenin and Stalin by himself and also in groups and in relation to our studying of the works of Marx, Lenin and Stalin, we should try to develop an understanding of the relationship between the theory of the Communist Party which we studied and application of that theory in our personal work, and that referred back in one particular instance, was the application, this day-to-day discussion with people.

And the final suggestion on that day was that the Communist Party should grow in the United States.

That about covers it.

Q. Covers Thursday's discussions?

A. Yes, sir.

[fol. 1105] Q. Mr. Childs, will you now go into Friday, and first, if you will, give us the books that, the literature that you used as a basis of Friday's discussion, if you have it.

A. Friday's discussions. We had a Chapter Seven, "Strategy and Tactics," from the "Foundations of Leninism."

Q. Let me interrupt you there.

Is this "Foundations of Leninism" that you refer to by Joseph Stalin the same as Government's Exhibit 5 that you identified a few moments ago?

A. Yes, sir; that is the same book.

Q. All right.

[fol. 1106] A. In the discussion of "Strategy and Tactics" on that day they pointed out later in reading an article by

a man by the name of Rockman, from the June, 1952, issue of "Political Affairs"—

Mr. Rein: How do you spell that?

The Witness: I have it here in my notes. R-o-c-k-m-a-n. Task in broadening the fight for peace.

Now the position of the Communist Party is that the fight for peace is a tactics of the Communist Party. And that, in relationship to our study of tactics there are certain things which we should do in order to try to develop support for a peace campaign, and in connection with that in the tactics was pointed out that these things we could use, certain organizations we should try to influence and use them as a means of furthering this tactics of the Communist Party which was a fight for peace. And some of these organizations which we specifically listed at the school, was the NAACP, the Quaker organizations, and send spokesm and material to various clubs and committees, veterans' organizations and the P.T.A. In other words, the Communist Party says that these organizations should be uti- [fol. 1107] lized in the tactics struggle for peace.

By Mr. Stanley:

Q. Was that the principal topic discussed on that day?

A. Yes, sir.

Q. Now if you will go into Saturday, please, Mr. Childs.

A. The Saturday session, the morning session included—I mean the Saturday morning session consisted of a report on an article by James Jackson, page 66, in the August, 1950, issue of "Political Affairs."

Q. Do you know who James Jackson was?

A. James Jackson, I understood at one time, was the Regional, Southern Regional Director for the Communist Party of the United States.

Q. All right. Go ahead.

A. This Jackson article concerned the theoretical aspects of the people's struggle in the South. In his article he pointed out, he discussed the background of the Southern communities, the facts which Jackson considered to be facts, which were elementary rights have been denied the people in the South, and that certain—such as landlords, bankers,

and industrialists—pointed out the state and political powers, the Dixiecrat Party, the Ku Klux Klan, the influence of political life of the South, and pointed out that the revolutionary pressures may develop in the South. He [fol. 1108] pointed out three revolutionary pressures which might develop, the Negro national liberation movement, the greater union movement of the democratic advancement facilities, the democratic advancement of the Southern man, pointed out the fact that the Communist Party needed to have a new attitude toward the South, and he went on through and discussed errors in view of the South and some corrections of those views, and the Saturday afternoon session was a discussion of Communist Party building.

This report was delivered by the District Organizer for the State of Virginia.

Q. What was his name?

A. At the school he was called Bob. In Bob's speech to us that afternoon he pointed out that the present historical error is imperialism, that the world is divided into two camps, the democratic camp, which is led by the Soviet Union and Eastern democracies, and the anti-democratic camp, which is led by the American capitalists. And he pointed out that in the capitalists' camp there is a necessity of export of capitalism which brings about the redivision of the world by force and Fascism, and also this export of capital and crisis within capitalist countries brings about an uneven development of capitalism which finds the United States brinking towards another world war.

Now he asked this question, How can this be stopped, [fol. 1109] How can this be stopped? And then he answered it. He said that the final solution is to—to economic crisis is only through the establishment of Socialism which can be established only through the overthrow of the capitalists, which through by a large, broad coalition led by the Communist Party—he said that tactics is broad coalition, the strategy is overthrow of the capitalist government. The coalition which is a tactics to be led by the Communist Party because only the Communist Party is armed with that theory, Marxism-Leninism, which can bring about the successful overthrow of the capitalist governments.

He said that there is no substitute for such a theory or

such a program. He also pointed out later on the weakness of the Party which has prevented it from obtaining this broad tactical mass coalition. The lack of clarity, the vanguard role—in other words, the lack of understanding that the Communist Party does not follow the working class, that it leads the working class of the United States, and underestimating the role of the working class—in other words, the working class is a particular role and the Communist Party has a particular role in leading the working class. Pointed out we should concentrate on cadres and mass movements. In relation to mass movements, in any relation which the Communist Party might be able to instigate or infiltrate, that these are to be used as recruiting grounds for the members of the Communist Party. In [fols. 1110-1111] other words, what they did was go through these organizations and they see what people tend to lean towards the Communist Party and also at the same time people who they might be able to influence and he discussed a lack of industrial concentration of the Party. In other words, sending members into particular industries which the Communist Party has designated as being concentration industry.

Also discussed the Negro liberation movement and here he pointed out the slowness on the part of the Communist Party to recruit Negro people and he pointed out that there has not been an increase in Negro members of the Party, that there has been a loss in Negro members of the Party, and, in order to try to keep Negro people in the Communist Party, he said we must, we should promote them to roles of leadership in the Communist Party.

He said that there had been a lack of attention to developments, trade union cadres. In other words outstanding Communist Party members who were in industry, and that these cadres had not been given enough schooling in attending classes and lack of—notwithstanding the work of the Communist Party, and that he pointed out how these weaknesses can be reversed.

In reversing the weakness of the Communist Party the members must grasp more firmly the necessity of building our Communist Party upon industrial workers. The same [fol. 1112] thing, going back to mass coalition in the indus-

trial concentration. Points out that we have a new ideological struggle. We must relocate our forces to key shops which comes back to assignment of Communist Party members to particular plants or particular industries involving full membership and planning of activation of the industrial concentration.

In other words, the Communist Party wants all members to take part in the industrial concentration program either actually planning it or actually carrying it out. Pointed out that the primary attention should be to shop cadre, should build industrial concentration, should check up on our work and point out the Communist Party builds and struggles and that there should be a recruiting program, that is, recruiting people for the Communist Party, always down from the district to the individual level, and estimates how many Communist members of the individuals or the district might be able to recruit.

Another one was to assign for a work as a recruiting—in other words, the Communist Party would assign Communist Party members the job of recruiting people for the Communist Party.

Develop special approach to youths and workers. In other words, analyze the situation of the women and the youth so that the Communist Party will be able to attract these people more than they have done in the past, and he [fol. 1113] mentioned, quoted Stalin and the cadre; decide everything that we must fight on that principle in the Communist Party and must try to have a cadre attend Party schools at least once a year and specifically building of the Party in the South. He pointed out the background, the struggles, the character and type and examination of new recruits and the relationship of reading literature and developing skill and know-how. In recruiting members in the South—and that about covers the discussion of Saturday.

Q. Did Warren Williams appear there on Friday afternoon?

A. On that day I believe, or some day. I recall it was either Friday or Saturday that Warren came to the school in order to take Don which I was previously introduced to as Abe, in order to get an airplane back to New York City.

Q. Who did you say Don was? Whom you were originally introduced to as Abe?

A. He was the National Committee of the Communist Party, National Representative of this school.

Q. I see.

Now on Sunday what did you say you did, that is, the second Sunday of the school?

A. The last Sunday of the school was devoted to what I have discussed to be criticism and self-criticism of the staff of the school, and each member of the school or each student of the school.

[fols. 1114-1118] What happened was that each staff member was criticized by the students and other faculty members and the students in turn were also criticized and their weaknesses pointed up in order that they might be able to correct these weaknesses and carry through the program of the Communist Party. The criticisms included those of Scales, Don, Marx, which was Nat Bond from Durham, Bob, the District Organizer for Virginia, Vera, which was Viola Brown from Winston-Salem, and these were criticisms of these people's pointing out their weaknesses.

[fol. 1119] Q. Mr. Childs, during the course of the school were there any demonstrations given there?

A. Yes, sir. Bob gave a demonstration.

Q. Tell us again who Bob was.

A. Bob was the District Organizer for the State of Virginia. He was a member of the staff of the Party school.

Q. Was Scales present at the time of this demonstration?

A. Yes, sir; he was present.

Q. Now will you tell the Court and the jury the demonstration that was given by Bob there?

A. The demonstration given by Bob, and he explained the purpose of it, was that we might need it on a picket line some day, was how to kill a man, using a wooden pencil or any pencil.

Q. Was a pencil, something similar to what I hand you, used in the demonstration?

A. Yes, sir.

Q. Will you demonstrate to the Court and the jury what [fols. 1120-1132] Bob taught or demonstrated to you in the use of a pencil to kill a person?

A. The pencil was to be placed in the palm of the hand.

Q. Stand around so the Court can see too.

A. So that the bank of the pencil will rest against the base of the thumb, and with this part protruding out over the hand. And then the pencil was to be, try to enter the person's body at one of two points, either at the, through the chest, through here (pointed) with an angle like this so that it would—try to penetrate as near the heart as possible. Also in case that was not possible, it was just to be used just as a regular dagger-type weapon and enter right at the base of the throat, right at the top of the breastbone.

[fol. 1133] In connection with a discussion of the Party

[fol. 1134] Club Betsy was trying to explain the purpose of a Party Club.

Q. Who was Betsy?

A. Betsy was—she attended the Party school and was the wife of George Van Camp.

Q. All right. Go ahead.

A. And in her trying to explain it, she—Scales interrupted her and said that he did not mean to say that she wasn't doing a good job, but she was getting a little confused, and Scales explained that the purpose of the Communist Party Club was not only for the Bourgeois democratic revolution but was for the ultimate Socialist revolution in problems of Leninism, Stalin discusses the difference between the Bourgeois revolution and the Socialist revolution.

[fol. 1135] A. He has recommended reading to me in which there was, of which this "Problems of Leninism"—it is founded in there—was Stalin clearly points out the difference between the Bourgeois democratic revolution and the Socialist revolution.

[fol. 1136] Q. This was in 1953? Now you are referring to——

A. '53.

Q. All right.

A. And at this meeting, it was a chance meeting at George and Betsy Van Camp's house where we had a short discussion on the Communist Party, what I was doing.

Q. Was Scales there?

A. Yes, sir; Scales was present.

Q. What about the second time you saw him in August of 1953?

A. That was, I recall, a little later in August. Perhaps near the end of the month. I don't recall exactly what time, but this was again a perchance of my meeting him there. It was not planned.

Q. Can you tell us the circumstances which you met him?

A. Well, I had gone to the house, to their apartment, and knocking on the door, and when, after awhile, George opened the door and saw who it was, and I went in, and then after we stood there and talked for awhile, Warren Williams and Scales came out of a back room. The door was formerly closed; said they wanted to be sure who it was before they came out.

Q. Mr. Childs, when was your last contact with the Communist Party?

A. That was Sunday morning, day before I took the stand.

[fols. 1137-1149] Q. During the entire period of your membership in the Communist Party what positions were held by the defendant, Scales, in the Communist Party?

A. He was Chairman of the North and South Carolina District.

Q. Of what?

A. Of the Communist Party.

Q. During the entire period of your membership in the Communist Party was there any change in its ultimate aims and objectives of the Communist Party of the United States?

A. During my association in the Communist Party it has never been told to me that the ultimate objectives have ever been changed.

[fols. 1150-1154] The Witness: I understood what Mr. Scales meant by the relationship of industrial concentration and wanting me to return to school, that if the Communist Party did not have people where they would be in positions to influence masses, organizations, that when the time came for things to come to a head, which I interpret to mean the revolution, that if we did not have that mass base, then it would be necessary for the Red Army to liberate us and we

didn't want the Red Army to have to go to all that trouble. [fols. 1155-1159] Q. In here, don't you? You didn't take any notes with regard to this incident that you have testified about the demonstration of the pencil; is that correct?

A. No, sir; no notes were taken on that because that was during a recreation period.

[fol. 1160] Mr. Rein: It seems to me, Your Honor, that particularly with regard to events that both this witness and Mr. Clonts have testified as being what they consider [fols. 1161-1191] to be the most significant event and the events that are most important in this matter, I think it bears on their credibility to show that even though by their own statements these are the most significant events, that there is no mention of it whatsoever, not any reports to the F. B. I. I think that that certainly bears on this credibility, their credibility in that respect because the fair inference would be, Your Honor, that although they might not have told everything to the F. B. I., they certainly would have told them the more significant matters.

The Court: No. As far as I will go will be to pick out any inconsistencies because I think that and that alone would have evidential standing, and I will ask the Government to produce those records.

[fols. 1192-1193] Fletcher Melvin Green was called as a witness by counsel on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rein:

[fols. 1194-1203] Q. And based upon that discussion, Professor Green, what was Mr. Scales' reputation for sincerity and honesty of conviction?

A. Well, I couldn't remember anything directly as to what anyone said about him. I would say that in general the point of view in so far as I could evaluate it among the members of the faculty was that he was a sincere, honest but misguided young man.

[fols. 1204-1254] ROBERT SONNE COHEN was called as a witness by counsel on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct examination.

[fol. 1255] By Mr. Rein:

Q. There have been writings in the Communist literature, [fol. 1256] that is, the United States, which you said you were familiar with in the past twenty years on this subject of the——

A. Oh, yes.

Q. Of the possibilities of peaceful developments of Socialism in the United States?

A. Yes. So far as I know the writings of the American Communist Party—this is—I think I can say with accuracy since 1935 certainly, it is consistently on this—there has been consistency, it has been consistently held that they can elect a majority in the United States. I could give citations on that, if you wish, if the Government wishes.

Q. Would you give some citation on that.

A. Your Honor, may I refer to notes?

The Court: Yes, refer to any notes you wish.

The Witness: Just on that question I thought I'd make some.

Oh, the Secretary of the American Communist Party, man named Eugene Dennis, wrote an article in the Communist Journal "Political Affairs" in September, 1948, the page reference is 815, and which he essentially refers to a long discussion by Engels in which Engels analyzes the condition for a peaceful transition to Socialism from capitalism and Dennis quotes this with approval and shows how he [fols. 1257-1305] thinks it applies to the United States.

Another one, perhaps one more will do—the other leader of the Communist Party of the United States, William Z. Foster, wrote what the Communist Party—yes, what the Communist Party has considered the chief document about itself, the chief orders which graphical documents called Foster's History of the Communist Party of the United States of America in that he specifically refers to the same

line of argument that I was indirectly telling you about from Stalin, so in both these men's writings they are the two chief leaders that I think of now—they have indicated that the Party, the Communist Party of the United States proposes to elect a Communist majority.

May I say that every time I have used the word Socialist I mean as the Communists mean it. There are, of course, many other people who call themselvse Socialists who are not Communists.

[fol. 1306] Redirect examination.

Q. Will you identify the book you are reading from.

A. Yes. This is the "History of the Communist Party of the United States".

Q. Who is its author?

A. By William Z. Foster.

Q. What is the date of the publication?

A. Published 1952.

Q. Would you read the excerpt to which you made reference, give me the page number?

[fol. 1307] A. This is page 551 and it goes over to 552.

"Marxist theorists, while warning the workers against capitalist violence have also pointed out possibilities for peaceful establishment of Socialism in countries where the democratic elements are strong. Thus Karl Marx, three generations ago, before the advent of imperialism with its highly centralized, heavily armed and bureaucratic state, said that, 'From Marx, if, for example, the working class in England and the United States should win a majority in parliament, in Congress, it could legally abolish those laws and institutions which obstruct its development.' From Marx.

"Lenin also in mid 1917 outlined a peaceful prospective for the Russian revolution. And Stalin, writing in 1928, while pointing out the danger of capitalist violence at that time, also said that with the strong government of world Socialism, 'a peaceful path of development is quite possible for certain capitalist countries.' From Stalin.

"The Communist Party of the United States of America proceeds upon the basis that such a possibility exists in the United States. The Communist Party orientation for a possible peaceful transition to Socialism in the United

[fol. 1308] States is based upon four elementary considerations; first, the fight of the working class for its immediate demand is the very substance of democracy. It strengthens basically the democratic forces in our country and by the eventual establishment of Socialism it raises democracy qualitatively to a new high level.

"Second, the working class led by the Communist Party harmonizes its methods with its end by fighting for both the immediate and ultimate objectives with the most peaceful and democratic means possible.

"Third, the workers and their allies constituting the vast majority of the people and possessing immense organizations now have the potential power to curb, restrain and make ineffective whatever violence the capitalists may undertake in their attempt to balk the will of the people and to prevent the establishment of Socialism.

"And, fourth, in recent years on the international scale, there has been an enormous growth of power in the camp of democracy and Socialism. The fundamental difference between the Communist Party and right-wing social democracy, and its Browderite variance—" I must interrupt. [fol. 1309] Browder is a former Communist leader. "—is not that the Social democracies want to establish Socialism by peaceful means and the Communists want to achieve it by violence. Instead the difference is that the Social democracies everywhere have abandoned Socialism altogether and are committed to an indefinite perpetuation of the capitalist system, whereas, the Communists have shown conclusively that in line with the democratic will and interest of the workers they are the ones that are resolutely leading the peoples of the world to Socialism. The Communist Party, although it does not advocate violence in the workers' struggles, cannot, however, declare that they will, there will be no violence in the establishment of Socialism in this country. This is because of the certainty of the reactionary attacks from the capitalists. The latter might even be able in case of inadequate resistance get masses to destroy democracy outright and to establish an American type of Fascist-like regime. In such even- there would result an entirely new political situation where the masses would be faced with the need of militant struggle for the

[fols. 1310-1321] most elementary economic needs and democratic rights. The United States there is a great danger of such massism. The Communist Party——"

Well, I can stop there. It repeats.

Q. Professor Cohen, I believe you have testified that your knowledge in regard to the views of the American Communist Party come solely from reading their writings, including this book and other articles; is that correct?

A. That is correct.

[fol. 1322] Mrs, A. [redacted] Scales was called as a witness by counsel on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rein:

[fol. 1323] — Where and when were you born, Mrs. Scales?

A. I was born in Richmond, Virginia.

Q. Draw from there then. Did you go to school in Richmond?

A. Yes, I did. I went to "Virginia—Randolph Alex School. It is now known as Saint Catherine's.

Q. Is that your total schooling? Did you go to a university?

A. Yes. No.

Q. Who is your husband, Mrs. Scales?

A. Alfred Moore Scales.

Q. When did you marry him?

A. In 1914.

Q. Did you move to Greensboro?

A. Right after that.

Q. At that time?

A. Yes.

Q. And you have been living in Greensboro since your marriage?

A. Almost entirely, except four years in Chapel Hill.

Q. What was your husband's occupation?

[fol. 1324] A. He was a lawyer.

Q. You are a widow now?

A. Yes.
Q. How many children do you have, Mrs. Scales?
A. Three.
Q. Is the defendant in this case, Junius Scales, your son?
A. Yes.
Q. When was he born?
A. March the 26th, 1920.
Q. Where?
A. In Greensboro.
Q. Did he go to school here in Greensboro?
A. Yes. He was first tutored at home and then he later went to the grade school here.
Q. Did he go to high school here in Greensboro too?
A. He went to junior high. I can't remember whether he went to senior high or not because right after that we left and we went to Florida for a winter and he went to school there and then we went to Chapel Hill where he went into graded school. I think it was his last year.
Q. Did he finish his schooling in Chapel Hill?
A. Yes.
Q. High school?
A. Yes.
[fol. 1325] Q. Did he then go to the University of North Carolina in Chapel Hill?
A. Yes.
Q. How long did he continue at the university, Mrs. Scales?
A. I think through his junior year, I believe.
Q. And that was when you were living at Chapel Hill?
A. Yes, I was living there.
Q. Then did he come back to Greensboro with you?
A. Yes.
Q. Where did he go to work then?
A. Yes.
Q. Where?
A. He worked in the Tax Department of the County of Greensboro.
Q. Here in Greensboro?
A. Yes.
Q. Did he subsequently go back to the university?
A. Yes, he did.

Q. Do you recall when that was or how long he stayed there?

A. Well, it was in 1940 and he went for the last quarter.

Q. I see. What did he do after that, Mrs. Scales?

A. I have to stop and think. Have to wait a minute and [fol. 1326] think what he did do.

Q. Take your time.

A. Oh, I know. Then he decided that he would not go back to school and that he would go to High Point to work.

Q. Did he have a conversation with you about that, as to his purpose in going?

A. Yes.

Q. What did he tell you?

A. Well, he said that he wanted to see if he could at that time—that was the way he expressed it—he wanted to live with the mill people and work among them and see if he could be of any help to them.

Q. Do you know how long he stayed there?

A. He stayed there until war was declared.

Q. What did he do then?

A. Then he volunteered immediately.

Q. Do you know how long he stayed in the service?

A. Four years.

Q. What did he do when he came out of the service, Mrs. Scales?

A. He went back to college.

Q. That is at the University of North Carolina?

A. Yes, he went back.

Q. Did it come to your attention at any time, Mrs. Scales, that your son had, was a member or official of the Commu- [fols. 1327-1331] nist Party?

A. Yes, I had heard from many people that he was interested in the Party, but I didn't ask him directly—directly until 1939 if he were a member, and then we had a conversation and he told me he was.

[fol. 1332] By Mr. Rein:

Q. Mrs. Scales, I believe you were testifying about a conversation that you had with your son in 1939 at which time he told you that he was a member of the Communist Party,

and then I think you were going on to his, the reasons he gave you at that time of his joining, becoming a member.

A. His reasons were always to be of help to his fellow man, and he didn't know of any other medium through which he could work successfully as he could through the Communist Party.

Q. Did he at that time state to you what he considered the aims and objectives of the Communist Party to be, Mrs. Scales?

A. Well, we had many discussions, and I was always so interested in his reaction and it always was that he wanted to help his—his whole idea was to help the underdog, as he [fol. 1333] expressed it.

Q. You say you had many discussions then?

A. Yes, I did.

Q. When did these discussions take place; the first one was in 1939; is that correct?

A. No. No, I had them before that but I wasn't sure that he was a Communist until then.

Q. Did you have discussions with him subsequently on the same subject and period of 1947 on?

A. Yes.

Q. '48, '49?

A. Yes.

Q. Did you ever discuss with him the question as to whether or not the Communist Party advocated the overthrow of the Government by force and violence?

A. Yes, I did. When it was a great deal of talk about it, I discussed it with him and wanted to know just exactly how he stood, and he said, "Mother, to my mind it would be just plain silly for a little minority group to try to overthrow the United States." He said, "They couldn't do it," and he said, "I hope you don't think I am stupid to think of such a thing."

Q. Did you ask him at that time or at any other time in these conversations you had with him how he thought the Communist Party would obtain its objectives in the United [fols. 1334-1379] States?

A. Yes. He said the only way would be to educate the people and if they wanted it, it was all right and if they

didn't, it was all right, but he liked to be able to get his ideas before the public.

[fol. 1380] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: The Court states that it has examined the report, that is, the report of the F. B. I. dealing with the [fols. 1381-1401] witness, Childs, and finds nothing in the reports inconsistent with the testimony given by Childs.

Now with that I understand the defendant rests.

Mr. Rein: May I—yes—may I ask one question with regard to that? Is Your Honor prepared to make any statement with regard to whether or not all of the testimony of the witness, Childs, is covered in those reports, or is Your Honor not prepared to state that?

The Court: I did not find that Childs had testified to anything that he had not reported.

Mr. Rein: Including the pencil incident.

The Court: Including the pencil incident.

Mr. Rein: In other words, Your Honor is stating that this was a report on the pencil incident in the files of the F. B. I.?

The Court: I will put it this way: That I found no report in the F. B. I. which contains a statement inconsistent with what the witness testified to, and I do not find that he testified to anything that he did not report.

Does that answer your questions?

Mr. Rein: Well, I don't know. I wish—I wonder if I can get an answer to a specific question, but if Your Honor doesn't care to——

The Court: My recollection is that the pencil incident was in there the same way that he testified to it.

[fol. 1402] Mr. Rein: I don't know whether your instruction includes what is covered by my proposed Instruction No. 5. You may not use the testimony as a statement made by other persons received against the defendant merely because such other persons were members of the Communist Party. The law does not make a member of the Communist Party responsible for the acts or statements of any other member merely because of their common membership in that organization.

[fols. 1403-1432] The Court: I do not think that there is any predicate for that instruction here because it has not

been brought in the evidence unless it was connected with him.

Mr. Rein: Well, I submit, Your Honor, that my view of the evidence is that there was not.

The Court: How does the Government feel about that?

Mr. McCusty: First of all, the Government would object to the form of such an instruction because I think it would not be clear. It would confuse the jury as to what was actually being said, the substance is probably all right except that we agree with the statement made by the Court, that all statements made in this case have been connected in some manner or form with the defendant.

[fol. 1433] EXCERPTS FROM OPENING ARGUMENT ON BEHALF OF THE GOVERNMENT

John Gates came down here to Chapel Hill, brought down here by the defendant in the Communist Party to speak and caused a near riot.

Look at this "Southern People's Common Program". This is the Defendant's Exhibit 16 that they have brought here for your consideration. It is for us to go by. It is the program that they outline for us issued by the Southern Regional Committee of the Communist Party, U.S.A., 266 Seventh Avenue, New York 1, New York. On page 12 we read:

"We people of the South must rid our state of all remains of slavery time laws, customs and institutions. We must make our local and state governments genuinely representative and democratic. We must throw out the present gangs [fols. 1434-1537] of the Dixiecrats, demagogs and deadbeats now in Congress. They are betraying the interest of the South and welfare of the nation. We must send to Congress a delegation of true representatives of the Southern people, white and Negro labor, farmers and local businessmen."

Now clean out the crowd we have and what are we going to do? We are going to establish a Negro nation in the South; that is, according to Joe Stalin. He said that the Negroes have the same economy, the same psychological makeup, and they are all oppressed, and therefore, they constitute a nation and they have a right to govern them-

selves, but that that can only come about in a Communist state.

[fol. 1538] DEFENDANT'S PROPOSED INSTRUCTION No. 2

The indictment charges that during the period from November 18, 1951 to November 18, 1954, the Communist Party was a society, group and assembly of persons who taught and advocated the overthrow and destruction of the government of the United States by force and violence, as speedily as circumstances would permit, and unless you so find, you must bring in a verdict of not guilty.

In order to support this portion of the indictment, you must find beyond a reasonable doubt that in the period in question at least a majority of the members of the Communist Party taught and advocated the overthrow and destruction of the government of the United States by force and violence, as speedily as circumstances would permit. The teaching and advocacy of the Communist Party, as an organization, or of some of its officers or leaders, cannot be imputed to the members of the Communist Party merely because of their membership.

DEFENDANT'S PROPOSED INSTRUCTION No. 5

You may not use testimony as to statements made by other persons as evidence against the defendant merely because such other persons were members of the Communist Party. The law does not make a member of the Communist Party responsible for the acts or statements of any other member merely because of their common membership in that organization.

DEFENDANT'S PROPOSED INSTRUCTION No. 6

The fact that the defendant used any book or writing in any school or class, or discussed such book or writing with some other person, or has read such book or writing cannot, standing by itself, be taken as proof that the defendant [fol. 1539] agreed with or approved any particular statement contained in such book or writing, or had knowledge of the teaching and advocacy of any other person with reference to such book or writing.

DEFENDANT'S PROPOSED INSTRUCTION No. 7

Intent is a state of mind and is purely personal. The intent of the defendant can be established only by his own acts, statements and writings. You cannot find the intent of the defendant from the acts and statements of any other person unless you are satisfied, and beyond a reasonable doubt, that the defendant authorized such acts and statements, knowingly consented to such acts and statements, or ratified such acts and statements after knowledge thereof.

DEFENDANT'S PROPOSED INSTRUCTION No. 8

In determining whether or not the defendant had the intent charged in the indictment, you cannot consider the testimony with reference to the acts or statements of any person other than the defendant himself, unless you are satisfied from the evidence that such other person was speaking or acting for and on behalf of the defendant and with the defendant's knowledge and consent.

[fol. 1540] CHARGE TO THE JURY

The Court: Ladies and gentlemen, let me have your attention for a few minutes and I will discuss this case with you. I may be of some help to you. At least, I hope I shall be.

As you know, this indictment is drawn under what is known as the Smith Act, and the indictment charges four things.

It charges first that the Communist Party of the United States is a group teaching or advocating the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances will permit;

Second, that the defendant was a member of this Party;

Third, that while a member of the Party, he well knew of its teachings and purposes;

Lastly, that he himself specifically intended to bring about such overthrow of the Government of the United States by force and violence as speedily as circumstances would permit.

Those are the accusations embraced in the indictment.

All of those charges, each and every one of them must

be proved beyond a reasonable doubt before the defendant [fol. 1541] can be convicted.

These four charges constitute the four elements of the crime of which the indictment accuses the defendant and there is no crime if any one of them is not proved.

The defendant has entered a plea of not guilty, and that is a complete denial of all of these charges; a denial of every inference of guilt, a denial of every implication of guilt and of the charges.

In considering this case I suggest to you that you consider it by taking each of the elements of the offense and consider it separately, and consider them in the order in which they are charged in the indictment.

In order to be punishable the criminal acts charged in the indictment must have been committed within the three years next preceding the finding of the indictment, that is, they must have been committed between November 18, 1951, and November 18, 1954, and unless the time is otherwise specified, the acts I mention as unlawful are to be understood by you as only those occurring within this three-year period.

Obviously, the first question for you to decide is this: Was the Communist Party of the United States during this three-year period a group or society criminally teaching and advocating the overthrow and destruction of the United States Government by force and violence as speedily as circumstances would permit. That is the first question for you [fol. 1542] to answer.

Now the answer to that question, and your decision on it, must be based entirely on the evidence that has been offered to you in this case. As you will recall, the evidence on this point from the Government's side, that is, from the prosecution's side, consists of certain books, documents, and treatises, and of the testimony of three members of the Party, testifying to what were the teachings of the Party, and on the defendant's side, the evidence consists of books, treatises and documents, and the testimony of a student of Marxism, Stalinism, Leninism and Communism, giving his opinion of what were the teaching of those authors and of the Party.

You should consider all of this evidence and ascertain

whether it does or does not prove beyond a reasonable doubt that the Communist Party of the United States of America taught and advocated the overthrow and destruction of the Government by force and volence as speedily as circumstances would permit.

You do not decide the case according to the greater number of witnesses. You decide the case according to the weight of the evidence, the persuasive or convincing power of the evidence. These questions must be answered by you according to what the evidence shows beyond a reasonable doubt, after weighing the evidence as I have indicated to you.

Let me emphasize to you again that the first question in [fol. 1543] this case is not whether Marxism, or Leninism, or Stalinism advocates the use of force and violence for a change of the government. The first question is whether the Communist Party of the United States, in fact, advocated the use of force and violence in such a change. You should, of course, consider the evidence in respect to what were the doctrines of Marx, Lenin and Stalin in determining what was the advocacy of the Communist Party of the United States of America. But what were the advocacies of Marx, Lenin or Stalin is not the final answer to the first question in this case, unless the jury should believe that the advocacy of the Communist Party in the United States was no more, nor less, than the advocacies of Marx, Lenin and Stalin.

In making your determination, your decision, of this first question, I may be of some assistance to you by telling you what does and does not constitute a teaching and advocacy of force and violence.

First, it is not criminal for any person or group to hold or express the belief that the Government of the United States should be completely changed. It is not criminal for any person or group to have such a change of government as a purpose or aim. It is not criminal to publicly advocate and urge such a change by peaceable and constitutional means. It is not criminal to criticize the Government and its policies, foreign and domestic, or to praise the policies of other governments, and this is true regardless of whether [fol. 1544] you agree or disagree with the truth or falsity of such criticism or praise. Nor is it criminal for the Com-

munist Party or anyone else to teach that should a change in our form of government be made and accomplished by peaceable and constitutional means, and thereafter the new government should be resisted by force and violence, then the new government would be justified in using force and violence to subdue such resistance; that is, if the change had been made by peaceful and constitutional means, the new government would have the right to protect itself against any other change save by peaceful, constitutional means.

You cannot convict the defendant merely because he was a member or an officer of the Communist Party, no matter what were the principles and teachings of the Party; for membership alone is not a crime. Moreover, the teaching in the abstract, or teaching objectively, that is, teaching, discussing, explaining or expounding, what is meant by the aim or purpose of any group or society of overthrowing the Government by force and violence, is not criminal. For example, study and discussion by the Communist Party or in school classrooms, or study groups, or public meetings, with the object of informing the participants or the audiences of such aims and purposes of the doctrines of Marx, Lenin or Stalin, is entirely lawful.

[fol. 1545] But it is criminal to advocate or urge the overthrow by force or violence of the Government at the opportune time. It is the "call to action," the use of language reasonably or ordinarily calculated to incite persons to such action, to overthrow the Government by force and violence at an advantageous time, that is criminal and is punished by the Smith Act. It is the calling for action, the advocating action, it is the inciting, or inducing to action, by words that reasonably are calculated to induce action, that is proscribed by the Smith Act—not simply the study or the exposition or discussion of such aims and purposes. It is the urge to put them into action that is condemned by the Smith Act.

There need not in fact be action. It is enough to be criminal if action is urged, the action to be taken as soon as circumstances will permit. But if no action is urged or advocated by language reasonably or ordinarily calculated

to induce or incite persons to such action, no crime has been committed.

It is in this understanding, and in this understanding only, that you must determine whether the evidence shows beyond a reasonable doubt that the Communist Party of the United States of America was a group or society teaching and advocating the overthrow and destruction of the Government by force and violence as soon as permitted.

If you are not convinced beyond a reasonable doubt that [fol. 1546] the Communist Party of the United States was such a group, that is, a group that urged and advocated the overthrow, then you can not find the defendant guilty and should acquit him without consideration of the remainder of the elements of the crime.

But, on the other hand, if you believe beyond a reasonable doubt that the Communist Party was such a group, then you should next consider whether the defendant, Scales, was a member or affiliated with the Party and the Court tells you, by the way, that that is admitted; he admits that he was a member of the Party. You must consider, secondly, whether he had knowledge of the aims and purposes of this Party, and, thirdly, whether on his part, he specifically intended to accomplish the overthrow of the Government by force and violence as soon as practicable.

To emphasize those points: To be punishable, the membership must have been within the period of November 18, 1951, to November 18, 1954. Earlier membership would not be covered by this indictment. It is barred, as not punishable, by the Statute of Limitations.

Knowledge by the defendant of the Party purposes must accompany the membership in order for the membership to be criminal, and that knowledge too must have existed during the three-year period.

And a specific intent, as I have already indicated to you, [fol. 1547] on the part of the accused to bring about the overthrow of the Government is also necessary and an indispensable requisite of the offense. Again, the intent must have existed during the three-year period.

Ladies and gentlemen, as you readily recognize knowledge and intent are states of mind, and they can not be, and hence they need not be, proved by what you and I know as direct

evidence. They can only be proved by circumstances. So in determining whether the defendant had the required knowledge and intent, you can, and should, consider his opportunity to acquire the knowledge, his education, his mentality, his study, his conduct, his words, his writings, and all circumstances indicating knowledge or intent, or a lack of knowledge or intent. In making the determination in respect to knowledge and intent, you are not limited to the occurrences during the three-year period for that purpose. You may consider evidence of his conduct as well as any other circumstances occurring prior to November 18, 1951.

If you have found beyond a reasonable doubt that the Communist Party of the United States was a group or society teaching or advocating the overthrow of the Government by force and violence at the propitious time, but you are not convinced beyond a reasonable doubt that the defendant knew of its purposes, or you are not convinced that he himself had the intent to accomplish that purpose, then [fol. 1548] you must find him not guilty, because those elements are just as indispensable to the offense as the aims and purpose of the Communist Party.

But if you do believe beyond a reasonable doubt that the Communist Party of the United States was such a group, and if you do believe that the accused was a member of the Party, and if you do believe that he well knew of its purpose and that he himself intended to accomplish that purpose, then you should find him guilty as charged in the indictment.

So much, ladies and gentlemen, for the principles of law defining and establishing the crime alleged in the indictment. I will endeavor now to explain to you the principles of law governing how you are to determine whether or not the conduct or circumstances constituting this offense do, in fact, exist. These are well known principles of law, but they are nevertheless fundamental, and they are binding upon every jury and every court in this land, and their repetition does not in any way, or familiarity does not in any way, lessen their importance. The first is this:

The Court charges the jury that whenever a person is charged with a crime he comes into court presumed to be

innocent, and this presumption of innocence is an abiding one, and goes with the defendant throughout the entire case and applies at every stage of it until it is repelled by proof.

Further, the burden is upon the United States to prove [fol. 1549] beyond a reasonable doubt the guilt of the defendant before he can be convicted. Mere suspicion or probability of guilt, however strong, is not sufficient to convict, nor is it sufficient if the greater weight or preponderance of the evidence supports the charge in the indictment. To warrant the conviction of the defendant, the evidence of the guilt of the defendant must be so conclusive as to exclude every reasonable theory or hypothesis of his innocence.

I have mentioned reasonable doubt and that phrase, perhaps better than any other, carries its definition. I will read to you an enlargement of that definition which may be of some aid.

I can define reasonable doubt no better than to say that it is a doubt founded on your sound and reasonable judgment after a consideration of all of the evidence in the case. A doubt that is engendered solely by sympathy or a dislike to accept responsibility for convicting is not a reasonable doubt. The law does not require absolute certainty, nor does it require proof beyond all possibility of mistake. It does require, however, that after weighing the entire evidence in the case, you should be satisfied to that degree of certainty that you would be willing to act on the faith of in your own important affairs. Therefore, if, after a fair and dispassionate consideration of all the evidence, you reach a point where you can say upon your conscience and [fol. 1550] judgment that from the evidence you are morally certain of the guilt of the defendant and that you can not reconcile the evidence with any reasonable theory of innocence, you will have been convinced beyond a reasonable doubt and you should find the defendant guilty. If, however, upon weighing all the evidence, it does not satisfy your judgment and conscience to that degree of certainty that will enable you to say that you are morally certain of the guilt of the defendant, you should return a verdict of not guilty.

There is in this case, as in so many cases, the question of what witnesses you are to believe. That is known as the

credibility, or believability of witnesses. That determination is solely one of and for the jury. The Court has no right and does not intend in any way to impinge upon that prerogative of the jury, and should anything that the Court says in this charge indicate its opinion or indicate recollection of the evidence different from yours, it is your duty to follow your own judgment. However, it is the duty of the Court to point out to you certain general principles which you should take into consideration when you consider this phase of the case.

There is no absolute or arbitrary guide or measure by which the jury shall determine the truthfulness or untruthfulness of a witness. Among the things which the jury may properly consider in such determination are whether the [fol. 1551] witness has any motive or reason for being truthful or untruthful in his testimony, whether there has appeared from the attitude and conduct of the witness any bias, prejudice or feeling, which may cause his testimony to be influenced thereby, whether his testimony bears the earmarks of truthfulness or untruthfulness and to what extent it is corroborated or confirmed by other testimony which is not questioned, or to what extent it is corroborated or confirmed by the known or admitted facts. The jury may also consider the intelligence of the witness, and his opportunity to have accurate knowledge of the matters to which he testifies. The jury should consider the testimony of the witnesses in connection with all the facts proven, and which are apparent, and from them determine the degree of credibility the jury will give to the weight, and the weight to be given to their testimony.

The Court charges the jury that the testimony of witnesses who were in the employ of the Department of Justice must be examined with greater scrutiny and care than the testimony of an ordinary witness.

In this case the defendant has introduced evidence as to his previous good character. Such evidence should be considered by the jury, and given such weight as it is entitled to receive when considered in the light of all the other testimony. If a person, by his conduct, has built up a reputation for good character, it is a fact which should be [fol. 1552] considered and the benefit of which should be

given to him, but it is only one fact to be considered along with all the other facts, and previous good character should not permit a person to escape conviction of a crime, if, considering all the facts, including the fact of previous good character, the jury is satisfied of his guilt beyond a reasonable doubt.

The Court charges the jury that if the evidence as to any material fact in the case is conflicting, the evidence of the good character of the accused may resolve such doubt into a reasonable doubt.

The defendant has not taken the witness stand and testified in his own behalf. The Court charges the jury that the defendant was entirely within his rights in not so doing, and that such failure does not create any prejudice against him and the jury should not permit that fact to weigh against the defendant in arriving at its verdict.

Ladies and gentlemen, the indictment in this case returned by a grand jury is in no sense evidence. It is simply a statement—a formal statement—of the charge or accusation made against the defendant, to apprise the defendant of what the charge is against him. The fact that it was found by a grand pury does not lend any weight to it as evidence.

You have to decide this case entirely on the evidence as you have heard it from the stand, and not on any opinion [fols. 1553-1572] not formed from this evidence. You decide it within and upon the law as outlined to you by the Court in this charge.

The Court reminds you that—you probably already know—the statements and arguments of the attorneys do not constitute evidence in the case.

Your verdict, whether it be a verdict of not guilty or guilty, must be unanimous. It must be the verdict of each and every one of you, the verdict of all of you, no matter which way it is.

When you retire to consider the case, you should select a foreman or forewoman to preside over your deliberations and to render your verdict, when you are ready to do so.

My understanding of the practice in this district is that the jury does not return a written verdict; simply returns into court and the foreman or forewoman at the request of

the Clerk announces the verdict of the jury. Your verdict would be not guilty or guilty, and no more. You do not have anything to do with the fixing of the punishment in the event you find the defendant guilty.

[fols. 1573-1585] JUDGMENT—April 22, 1955

The Court: It is the judgment of the Court that you be committed into the custody of the Attorney General of the United States or his duly authorized representative to be imprisoned for a period of six years unless sooner released by operation of law.

[fol. 1586] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7016

JUNIUS IRVING SCALES, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO

OPINION—November 7, 1955

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

David Rein for Appellant, and Edwin M. Stanley, United States Attorney, and Kevin T. Maroney, Attorney, Department of Justice, (William F. Tompkins, Assistant United States Attorney, John H. Davitt and William G. Hundley, Attorneys, Department of Justice, on brief) for Appellee.

[fol. 1587] PARKER, Chief Judge:

This is an appeal in a criminal case by a defendant who has been convicted of violation of section 2 of the Smith

Act of June 28, 1940, 54 Stat. 670, 671, 18 USCA 2385. That section, as brought forward in the United States Code, is as follows:

> "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> "Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—
>
> [fol. 1588] "Shall be fined not more than $10,000 or imprisoned not more than ten years or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

The indictment, which was returned on November 18, 1954, charged that the Communist Party of the United States of America has at all times been "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit" and that the defendant Scales "had been a member of said Communist Party from January 1946 up to the filing of the indictment well knowing during all of said period that said Communist Party of the United

States of America was and is a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, and said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit."

The evidence in the record amply sustained the charge in the indictment. There was evidence, similar to that in *Dennis* v. *United States*, 2 Cir. 183 F. 2d 201, 341 U. S. 494, and *Frankfeld* v. *United States*, 4 Cir. 198 F. 2d 679, to the effect that the Communist Party advocates the overthrow of the Government of the United States by force and violence. It was admitted that defendant Scales was a member of the party during the period covered by the indictment and was chairman of the North and South Carolina District of the party; and there was ample evidence that [fol. 1589] he knew of its purpose to overthrow the government by force and violence, that he approved of that purpose and that he had so expressed himself to witnesses who testified on the trial.

The case was submitted to the jury in a charge which clearly excluded any possibility of "guilt by association". The jury was expressly instructed that, before there could be a conviction of defendant, four things must be proved beyond a reasonable doubt: (1) That the Communist Party of the United States was a group teaching or advocating the destruction or overthrow of the Government of the United States by force and violence, (2) that the defendant was a member of the party, (3) that, while a member of the party, he well knew of its teachings and purposes and (4) that he himself intended to bring about the overthrow of the Government of the United States by force and violence. In addition to this the trial judge carefully explained that the defendant could not be convicted merely because he was a member of the Communist Party but only upon a finding that he knew of and participated in the purpose of the party to overthrow the government by force and violence, saying:

> "First, it is not criminal for any person or group to hold or express the belief that the Government of

the United States should be completely changed. It is not criminal for any person or group to have such a change of government as a purpose or aim. It is not criminal to publicly advocate and urge such a change by peaceable and constitutional means. It is not criminal to criticize the Government and its policies, foreign and domestic, or to praise the policies of other governments, and this is true regardless of whether you agree or disagree with the truth or falsity of such criticism or praise. Nor is it criminal [fol. 1590] for the Communist Party or anyone else to teach that should a change in our form of government be made and accomplished by peaceable and constitutional means, and thereafter the new government should be resisted by force and violence, then the new government would be justified in using force and violence to subdue such resistance; that is, if the change had been made by peaceful and constitutional means, the new government would have the right to protect itself against any other change save by peaceful, constitutional means.

"You cannot convict the defendant merely because he was a member or an officer of the Communist Party, no matter what were the principles and teachings of the Party, for membership alone is not a crime. Moreover, the teaching in the abstract, or teaching objectively, that is, teaching, discussing, explaining or expounding, what is meant by the aim or purpose of any group or society of overthrowing the Government by force and violence, is not criminal. For example, study and discussion by the Communist Party or in school classrooms, or study groups, or public meetings, with the object of informing the participants or the audience of such aims and purposes of the doctrines of Marx, Lenin or Stalin, is entirely lawful. But it is criminal to advocate or urge the overthrow by force or violence of the Government at the opportune time. * * *

"It is in this understanding, and in this understanding only, that you must determine whether the evidence shows beyond a reasonable doubt that the Communist Party of the United States of America was a

group or society teaching and advocating the overthrow and destruction of the Government by force and violence as soon as permitted. If you are not [fol. 1591] convinced beyond a reasonable doubt that the Communist Party of the United States was such a group, that is, a group that urged and advocated the overthrow, then you can not find the defendant guilty and should acquit him without consideration of the remainder of the elements of the crime.

"But, on the other hand, if you believe beyond a reasonable doubt that the Communist Party was such a group, then you should next consider whether the defendant, Scales, was a member or affiliated with the Party and the Court tells you, by the way, that that is admitted; he admits that he was a member of the Party. You must consider, secondly, whether he had knowledge of the aims and purposes of this Party, and, thirdly, whether on his part, he specifically intended to accomplish the overthrow of the Government by force and violence as soon as practicable.

"To emphasize those points: To be punishable, the membership must have been within the period of November 18, 1951, to November 18, 1954. Earlier membership would not be covered by this indictment. It is barred, as not punishable, by the Statute of Limitations.

"Knowledge by the defendant of the Party purposes must accompany the membership in order for the membership to be criminal, and that knowledge too must have existed during the three-year period.

"And a specific intent, as I have already indicated to you, on the part of the accused to bring about the overthrow of the Government is also necessary and [fol. 1592] an indispensable requisite of the offense. Again, the intent must have existed during the three-year period.

* * * * * * *

"If you have found beyond a reasonable doubt that the Communist Party of the United States was a group or society teaching or advocating the overthrow

of the Government by force and violence at the propitious time, but you are not convinced beyond a reasonable doubt that the defendant knew of its purposes, or you are not convinced that he himself had the intent to accomplish that purpose, then you must find him not guilty, because those elements are just as indispensable to the offense as the aims and purpose of the Communist Party."

The principal contentions of defendant upon this appeal are: (1) that the act under which he is indicted is unconstitutional and void; (2) that prosecution of the offense charged is barred by section 4(f) of the Internal Security Act 50 USC 783(f); and (3) that the court erred in admitting and allowing the jury to consider evidence tending to show the purpose of the Communist Party to overthrow the government by force and violence, where such evidence did not consist of statements made by defendant or in his presence or related to matters occurring prior to the three year limitation period preceding the finding of the bill of indictment. Other points of minor importance are raised relating to the regularity and fairness of the trial which have been duly considered and which will be referred to after we have dealt with these three principal questions.

[fol. 1593] 1. The Constitutionality of the Statute

The portion of the statute here applicable is the third paragraph of section 2385 of Title 18 of the United States Code, quoted above, relating to membership in a group advocating the overthrow of the government by force and violence by one who becomes or remains a member thereof knowing of its criminal purposes. In the light of the decisions in the Dennis and Frankfeld cases, supra, we think there can be no doubt as to the constitutionality of this provision of the statute. It is said that those cases related to conspiracy; but the conspiracy charged was conspiracy to violate the statute and the validity of its provisions was necessarily involved and was expressly passed upon in the light of the same arguments relating to "guilt by association" and "clear and present danger"

that are made here. In the Frankfeld case we said (198 F. 2d at 683-684):

> "Defendants argue that, even though the Smith Act be not unconstitutional in its entirety, the 'membership' and 'literature' provisions of the act must be held invalid and that this invalidates their conviction, since violation of these provisions was charged as being among the objects of the conspiracy. What was said by the Supreme Court in the Dennis case is a sufficient answer to this argument. There is no distinction in principal between advocating through the printing and distribution of literature the destruction or overthrow of the government and advocating it by word of mouth. So far as 'membership' in an organization advocating such destruction or overthrow is concerned, such membership is condemned only where there is knowledge on the part of the accused of the unlawful purpose of the organization. Membership in an organization renders [fol. 1594] aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged. Certainly it is within the power of Congress to forbid the circulation of literature advocating the forcible overthrow or destruction of the government or membership in an organization having such destruction as its purpose, where there is knowledge of such purpose on the part of one accepting or retaining such membership.
>
> "The defendants contend that these provisions of the statute are unconstitutional because they do not require a 'clear and present danger' as a condition of criminality; but it would be little short of absurd for a statute to forbid advocacy of the destruction of the government or membership in an organization formed for the purpose of such advocacy only in the event that they result in 'clear and present danger.' This would be to make the near success of an attempted crime the criterion of criminality for making the attempt."

The membership clause of the statute is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes and that all are guilty who join it with knowledge of such purposes; and all that the statute does is apply this fundamental concept of conspiracy to an organization having for its purpose the forcible overthrow of the government. This was considered in the Frankfeld case, where we said (198 F. 2d 689): "If it be argued that [fol. 1595] the crime defined by section 2(3) is in essence the crime of conspiracy, the position of the defendants is not helped; for the result would be merely that such conspiracy is thus made criminal by two sections of the act." As the effect of the membership clause is to define as well as make criminal a conspiracy to overthrow the government, all that was said in the Dennis and Frankfeld cases as to the validity of the statute is pertinent here. In the Frankfeld case we said (198 F. 2d 682):

> "The question presented is not one as to freedom of speech or as to the right to organize for proper political purposes, but goes to the power of the government to outlaw and punish conspiracies whose purpose it is to overthrow the government itself by force and violence. Modern history is replete with instances of the danger to the government inherent in such conspiracies; and there is nothing in the Constitution or in any sound political theory which forbids it to take effective action against that danger. If it may take action to protect itself from being overthrown by force and violence, it necessarily follows that it may forbid conspiracies having that end in view and may punish such conspiracies as criminal. In the absence of conspiracy the 'clear and present danger' rule may furnish a satisfactory criterion of criminality in the case of ordinary speeches advocating force and violence; but such rule has no practical application to advocacy of violence in connection with conspiracies to overthrow the government, for the danger of such conspiracies is ever 'clear and present.' They are pregnant with potential evil, which, while hidden from view in normal times,

is likely to assert itself as an irresistable force when some national crisis presents an opportunity for a putsch or a coup 'etat."

[fol. 1596] In the Dennis case, the late Chief Justice Vinson, speaking for the Supreme Court, answered in the following language the argument that the statute must be held invalid in application of the "clear and present danger" rule:

"Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionist, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. * * *

"Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized [fol. 1597] conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the

inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. Cf. *Pinkerton* v. *United States*, 1946, 328 U. S. 640, 66 S. Ct. 1180 90 L. Ed. 1489; *Goldman* v. *United States*, 1918, 245 U. S. 474, 38 S. Ct. 166, 62 L. Ed. 410; *United States* v. *Rabinowich*, 1915, 238 U. S. 78, 35 S. Ct. 682, 59 L. Ed. 1211. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."

In his concurring opinion in the Dennis case, the late Mr. Justice Jackson pithily observed:

> "But it is not forbidden to put down force or violence, it is not forbidden to punish teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose.
>
> • • • • • • •
>
> "There is no constitutional right to 'gang up' on the Government."

[fol. 1598] "Guilt by association" is not punished by the statute; for knowledge of the criminal purpose of the organization is made a condition of guilt in joining it. The "clear and present danger" rule has no application to the statute, since what it denounces is a conspiracy to overthrow the government by violence; and Congress may unquestionably forbid incitement to crime and organization for that purpose and may make such organization criminal, irrespective of the immediacy of the danger resulting from such organization.

2. Effect of the Internal Security Act

Defendant relies upon section 4(f) of the Internal Security Act otherwise known as the Subversive Activities Control Act of 1950, 61 Stat. 987, 991, 50 USC 783(f), which provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." The purpose of this provision, as defendant correctly argues, was to insure the enforceability of the registration provisions of the act by making the privilege against self incrimination unavailable as a defense to failure to register. The language of the section relied on, however, provides merely that neither holding of office nor membership in a Communist organization shall constitute per se a violation of a criminal statute. It does not purport to exempt from criminal liability membership in an organization advocating the overthrow of the government by force and violence where such membership is acquired or held with knowledge of the criminal purpose in which the organization is engaged. In other words, mere membership in the party is not a crime. Membership with knowledge of the criminal purpose of the organization remains a crime.

[fol. 1599] Whether the effect of the language used is to make the privilege against self incrimination unavailable to those who fail to register as required by the act, we need not stop to inquire. It is clear that the language used does not exempt from criminal prosecution members of the Communist party who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government. Even though the Communist Party has such purpose, membership per se is not made a crime under the Smith Act; and it is only membership per se, which is exempted from criminal prosecution under section 4(f) of the Internal Security Act. That no modification of the provisions of the Smith Act was intended by Congress in the passage of the Internal Security Act of 1950 is made abundantly clear by section 17 of the Internal Security Act, 64 Stat. 1003, 50 USC 795, which provides: "The foregoing provisions of this title shall be in addition to and not in modification of existing criminal statutes."

In view of this interpretation which Congress itself placed on the statute at the time of its passage, there is no occasion for further discussion as to its effect upon the Smith Act. The charge of the court, heretofore quoted, made it clear that defendant could not be convicted because of mere membership in the party.

3. The Evidentiary Questions

Defendant complains that the trial judge admitted and allowed the jury to consider evidence relating to the aims and purposes of the Communist Party, by documents and teachings with which he was not connected, that some of this related to aims and purposes other than the use of force and violence and that a considerable part of it related to publications and teachings prior to the three year limitation [fol. 1600] period preceding the finding of the indictment. We think that this complaint is entirely without merit. The evidence as to the teachings carried on by the party and the documents used in the teaching was clearly competent to show the aims and purposes of the party; that which related to infiltration, subversion and the arousing of dissension had a direct bearing on the purpose to overthrow the government by force and violence when a favorable opportunity should present itself; and the fact that some of the evidence related to the period preceding the limitation period was no objection to its admissibility, since there was no evidence of any change in the aims and purposes of the party in the meantime and the evidence introduced clearly indicated that there had been no such change. Of course, the defendant could not be convicted unless he was shown to have had knowledge of its aims and purposes and the jury was clearly so instructed; but there was ample evidence to establish such knowledge on his part. Aside from the fact that he was chairman of the party in North and South Carolina and on account of his position is reasonably presumed to have known its aims and purposes, there is direct evidence that he did have such knowledge. Thus, in a conversation with the witness Clontz, when Clontz, after reading the communist literature advocating revolution which defendant had furnished him, inquired whether communism could not be brought to the people of the United States through a

process of education, defendant replied in the negative and said that the use of force was the only answer. Clontz's testimony with respect to this conversation is as follows:

> "Additionally then I posed to Scales the question, If you can have a publishing company and if Communism is the better form of government and the better way of life, why can't we bring Communism here to the United [fol. 1601] States by educating the people, by showing them that this is the best form of government?
>
> "Scales answered me that that was entirely fallacious, that that would never work, that in the first place the Government of the United States owned all the media of communication, the newspapers, . . . the—I don't believe he mentioned television—but the newspapers and radio and other similar mediums; they controlled the schools, the other institutions of Government and that they would not permit the masses of people to learn the truth about this Communism, that in order to get the truth to the people you would first have to destroy the Government and destroy the mediums of communication control and destroy the institutions of Government, that Stalin and his followers had proved conclusively that ideas alone would never change the form of government or would never do anything. He said that it would be nice if revolution happened automatically but, he said, that unfortunately they didn't, that a small militant force had to bring about a change in government by revolution.
>
> "I recall he said that that is where we, the Communist Party, come in. He said that Engels, the philosopher of some kind, that collaborated with Karl Marx, had felt that when the revolution comes about, Government would just disintegrate and the people would just sort of run things very loosely. He said that Lenin had proved that that didn't follow, that when the revolution took place in the Soviet Union in Russia, that Lenin had taken the police power, that the Czar had used that police power to consolidate his position and as Junius put it, to protect the masses of the people from the encroachment of the foreign capitalist countries that

[fol. 1602] would try to come in and prevent the revolution.

"Scales said, and it made quite an impression on me, that force is the only answer, that ideas alone can never accomplish anything.

"That was the substance of our conversation at that time."

In a later conversation with Clontz on the subject of what aid could be expected from the Soviet Union in case of revolution, defendant said, according to Clontz's testimony:

"I recall during one of these meetings in the spring of 1950 Scales brought up the question of permanent revolution. Permanent revolution was defined by Scales as the concept that the Soviet Union and the Communist Party in the Soviet Union were not through with their job after they had achieved Socialism. In the Soviet Union they had a continuing obligation. He said that when the Soviet Union Communist Party had brought about a revolution and had brought Socialism there to the Soviet Union, they still were obligated under Stalin's teachings and under common sense, as he put it, to continue assisting the Communist Party all over the world until they had overthrown the capitalist governments including that of the United States that would threaten Communists, Communism and Socialism, unless they were overthrown.

"Now I asked Scales, Does that mean that when the day of the revolution comes, Soviet Union is going to land troops?

"Scales' answer to that was that as a practical matter the Soviet Union would not land troops at the commencement of the revolution, that the Communists here [fol. 1603] in the United States would have to start the revolution themselves. He pointed out that the Communist Party in the Soviet Union had learned through experience in China that direct Soviet Union guidance immediately in the form of leadership was not desirable. He said they sent a general over to China during the time the Chinese Revolution was taking place, and

this Russian General that was sent over by the Communist Party resulted in having the troops completely routed, that Mao, the Chinese leader there in China had never been to the Soviet Union in his life at that period of time in 1950, but that instead the Soviet Union had sent political advisors over to educate him in the proper Communist technique, and had furnished them assistance through their military advisers and that sort of thing. He said that once the revolution was started, if it began to look as though the police power of this country would be used against the working class in the Communist Party, then certainly the 'mother country' as he called the Soviet Union, could not stand by and see that happen but would have to land troops to protect us."

Defendant did not take the stand to deny either of these statements or to testify to any change of views on his part. Standing uncontradicted, they clearly established knowledge by defendant of the unlawful purposes of the party within the limitation period as well as prior thereto, since the running of the statute of limitations cannot empty a man's mind of knowledge of this sort. When defendant remained chairman of the party in the North and South Carolina district during the limitation period, he did so with clear knowledge of its purposes, as revealed in these [fol. 1604] conversations. Added to this is the testimony of Clontz that in December 1951, within the limitation period defendant informed him that he, the defendant, was going "underground" and that, on the orders of the party, Clontz was not to use the telephone, the telegraph or the mails in communication with him.

It was not necessary to his guilt that the defendant take part in the teaching or have a hand in the preparation of the documents of the Communist Party or even that he be shown to be familiar with the documents. All that it was necessary to show was that the party did advocate the overthrow of the government by force and violence and that he became or remained a member during the period not barred by the statute of limitations with knowledge of that unlawful purpose. The evidence objected to on the ground that it

was res enter alois acta was clearly competent to establish the unlawful aims and purpose of the party. With respect to that which showed knowledge prior to the statute of limitations, this was clearly competent as scienter and intent were elements of the offense. See *United States* v. *Mesarosh* 3 Cir. 223 F. 2d 449; *United States* v. *Schneiderman* 106 F. Supp. 892, 897. There can be no question but that the evidence objected to is competent in a conspiracy case. See *United States* v. *Flynn*, 2 Cir., 216 F. 2d 354; *Short* v. *United States*, 4 Cir. 91 F. 2d 614, 618; *Cameriato* v. *United States*, 4 Cir. 58 F. 2d 557, 558. And as pointed out above, a charge under the membership clause of the Smith Act is a charge of conspiracy. There is no magic in the use of the word "conspiracy" or "conspire"; and to charge that defendant became or remained a member of an organization advocating the forcible overthrow of the government is to charge that he became a party to an unlawful conspiracy for the purpose and makes applicable the rules relating to proof of guilt in joining a conspiracy.

[fol. 1605] 4. Other Contentions

Other contentions of defendant may be dealt with briefly. The contention that the evidence was not sufficient to sustain the verdict is manifestly so lacking in merit, in view of what has been said, as not to warrant further discussion. The requested prayers for instruction were properly declined as the law was fully covered in the court's charge in a light as favorable to the defendant as could possibly have been given, and the requested instructions would have served no purpose except to confuse the jury. The government's summation did not exceed the comment that is reasonably to be expected in jury arguments and the trial judge expressly instructed the jury that "the statements and arguments of the attorneys do not constitute evidence in the case." It is elementary that whether a mistrial shall be declared because of arguments of counsel is a matter resting in the sound discretion of the trial judge; and, certainly, there was no evidence of any abuse of discretion here.

The defendant's challenge to the grand jury on the ground that the clerk of the court and the jury commissioner had delegated their functions to others is without merit.

The fact that they asked leaders of various organizations to furnish them with names of persons qualified to serve as jurors is unimportant so long as they themselves made the decision as to what names should go in the box. There is nothing to indicate that the persons whose names were placed in the jury box did not represent a fair cross section of the community or that defendant was prejudiced in any way by the method of selection. The questions propounded by the judge to the trial jury on the voir dire were sufficient for the selection of an impartial jury and that was all that defendant had a right to ask. The form of the questions to [fol. 1606] be propounded for that purpose is a matter resting in the discretion of the trial judge. *Dennis* v. *United States* 2 Cir. 183 F. 2d 201, 226. Defendant complains because the judge did not excuse for cause three of the jurors who were subsequently peremptorily excused in the exercise of defendant's right to strike. The judge found, however, that these were impartial jurors and we would not be justified in setting aside his finding with regard thereto. *Reynolds* v. *United States* 98 U. S. 145, 156.

Defendant complains because the judge denied his request that his counsel be furnished with F.B.I. reports to the Department of Justice as to statements of the witnesses Clontz and Childs and that the selective service file of Childs be produced for examination by his counsel. These requests were properly denied. As to the F. B. I. reports on the statements of Clontz and Childs, there was no suggestion that they contained anything contradictory of testimony given by these witnesses on the trial, and the trial judge, who examined the statements, held that there was nothing in them contradictory of that testimony. There is nothing in the Constitution or elsewhere that permits a defendant to conduct a fishing expedition of the sort here proposed. The Constitution guarantees to a defendant accused of crime the right to be confronted by the witnesses against him, not the right to rummage through the secret files of the government in the hope that he may possibly find something contradictory of such witnesses. The same may be said with added force as to the selective service file of Childs, where the purpose was to rummage through a confidential file of the government in the hope of finding something that might

contradict a witness as to a collateral matter. There is nothing to the contrary in *Gordon* v. *United States*, 344 U. S. 414. There a key witness for the government had admitted [fol. 1607] on cross examination that he had given statements contradictory of his testimony to government agents and that sentence on him had been withheld for complicity in the same crime by the judge who advised him to tell the whole story to the probation officers even though it might involve others. The decision was limited to the narrow case thus presented and expressly distinguished from "any broad or blind fishing expedition among documents possessed by the government on the chance that something impeaching might turn up," (see 344 U. S. at 418-419) which is the case here.

The defendant had a fair and impartial trial before an able and experienced trial judge. He was shown to be not only a member but also the chairman for the North and South Carolina District of the Communist Party, an organization shown to be an organization advocating the overthrow of the Government of the United States by force and violence, and held to be the basis of the criminal conspiracy charged in the Dennis, Frankfeld, Flynn, Mesarosh and Shneiderman cases, referred to above. Uncontradicted testimony as to statements by him showed that he was thoroughly aware of the unlawful aims and purposes of the party, was in sympathy with those aims and purposes and entered into its activities with complete understanding of what was involved. On the evidence before it, the jury was amply justified in finding him guilty of the crime charged; and we find nothing in the record which would justify us in awarding a new trial.

Affirmed.

[fols. 1608-1618] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7016

JUNIUS IRVING SCALES, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

JUDGMENT—November 7, 1955

Appeal from the United States District Court for the Middle District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

November 7th, 1955.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 1619] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—November 17, 1955

This Court having at its present November term, 1955, rendered its decision affirming the judgment of the said District Court appealed from in this cause, and the appellant having on November 16, 1955, filed a petition for a rehearing of the said cause and, after careful consideration thereof, being of the opinion that the petition for rehearing presents no question not heretofore fully considered by the court,

[fols. 1620-1621] It is now here ordered by this court that the rehearing asked for be, and the same is hereby, denied.

November 17, 1955.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 1622] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 6th, 1956.

Earl Warren, Chief Justice of the United States.

Dated this 5th day of December, 1955.

[fols. 1623-1624] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 16th, 1956.

Tom C. Clark, Associate Justice of the Supreme Court of the United States.

Dated this 30th day of December, 1955.

[fol. 1625] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 26, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted,

and the case is assigned for argument immediately following Nos. 308, 309, 310, 547, and 566.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9979-6)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~626~~ 3

JUNIUS IRVING SCALES,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

JUNIUS IRVING SCALES, *Petitioner*,

v.

UNITED STATES OF AMERICA.

No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner, Junius Irving Scales, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on November 7, 1955.

Opinion Below

The opinion of the court below (Appendix A, *infra*, pp. 25-45) has not yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on November 7, 1955, and a petition for rehearing was denied on November 17, 1955. By order of Chief Justice Warren, the time for filing a petition for certiorari was extended to January 6, 1956, and by subsequent order of Mr. Justice Clark the time for such filing was extended to and including January 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

The Circuit Court of Appeals for the Fourth Circuit affirmed a judgment of the District Court of the United States for the Middle District of North Carolina, entered upon a jury verdict under an indictment, finding the petitioner guilty under the so-called "membership clause" of the Smith Act (Act of June 28, 1940, 18 U. S. C. 2385), proscribing membership in any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of the Government of the United States by force or violence, with knowledge that the purposes of the group of persons are such. It is not disputed that the petitioner was a member of the Communist Party during the three-year period prior to the indictment. The questions are:

1. Whether the "membership clause" of the Smith Act is unconstitutional on its face, or as applied to the facts of this case;

2. Whether the indictment charges an offense under the laws of the United States, in view of Section 4(f) of the Internal Security Act of 1950 (50 U. S. C. 783(f)), which provides that neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of that or any other criminal statute;

3. Whether the evidence was sufficient to support the judgment of conviction under the Smith Act; and

4. Whether, in four particular and important respects, petitioner was denied a fair trial.

Statutes Involved

The relevant provisions of the Constitution of the United States, the Smith Act, the Internal Security Act of 1950,

the Communist Control Act of 1954 (50 U. S. C. 841) and the federal statutes governing the qualifications and empanelling of jurors (28 U. S. C. 1861, 1864) are set forth in Appendix B, *infra*, pp. 46-51.

Statement

The petitioner has not been accused or convicted of helping to organize the Communist Party, or of advocating the overthrow of the United States Government by force and violence. He has not been accused or convicted of conspiring for such purposes, or of participating in a conspiracy of any kind. He has not been accused or convicted of any *act* whatever, other than being (or, more accurately, not ceasing to be) a member of the Communist Party.

The indictment (Pet. App. 2-3),[1] returned on November 18, 1954, charges that the Communist Party is and has since January 1946 been a group of persons who advocate overthrowing the United States Government by force and violence; that Junius Irving Scales is and has since January 1946 been a member of the Communist Party; that Scales knew the Party to be a group of persons who advocate violent overthrow; and that Scales intended "to bring about such overthrow by force and violence as speedily as circumstances would permit".

The trial opened April 11 and ended April 22, 1955. It was conceded by the prosecution (and the Trial Judge so charged, Pet. App. 4) that Scales' criminal act had to be committed between November 18, 1951 and November 18, 1954, the three-year limitations period preceding the indictment. It was acknowledged by Scales (and the Trial Judge so informed the jury, Pet. App. 7), that he was a

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[1]References designated "Pet. App." are to the Appendix to petitioner's brief as appellant in the court below; those designated "Govt. App." are to the Appendix to the Government's brief below; those designated "Tr." are to the trial transcript.

member of the Communist Party within the statutory period.[2]

The prosecution called three witnesses. The first was Lautner, a paid consultant for the Department of Justice and formerly a Communist. He had never met or had any contact with Scales, and had left the Communist Party in 1950, nearly two years before the limitations period. His testimony (Govt. App. 2-23) was limited to the identification of various publications used in Communist circles and to the expression of his opinion, based on these documents and his personal experience while a Communist, that the Party advocated the destruction of the Government by force and violence (Govt. App. 17-23).

The second witness, Clontz, made contact with Scales in North Carolina in 1948 and joined the Communist Party there in 1950, by pre-arrangement with the Federal Bureau of Investigation (Govt. App. 24). He went to New York City in March 1951, and all but one item[3] of his testimony relates to occurrences prior to the statutory period. His conversations with Scales before joining the Party were heavily relied on by the Government, to show Scales' knowledge of the Party's aims (Govt. App. 24-55). The court below, in ruling that there was sufficient evidence to support the conclusion that Scales knew that the Party advocated violent overthrow, relied principally (apart from Scales' membership and official position in the Party) on a single conversation between Scales and Clontz in December 1948[4], nearly six years before the indictment was brought.

The third Government witness, Childs, likewise joined the Party as an observer for the Federal Bureau of Inves-

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[2]Petitioner is publicly known as Chairman of the Communist Party in North Carolina.

[3]Clontz testified to a telephone conversation with Scales in December of 1951 (Govt. App. 55).

[4]The conversation is set forth in the opinion below, Appendix A, *infra* pp. 38-40.

tigation. He testified extensively concerning his conversations with Scales and his attendance at a Party "school" in 1952 (Govt. App. 55-60; Pet. App. 14-43). But he did not testify that Scales intended to overthrow the Government by force, that Scales knew the aims of the Party to be such, or that in fact they were such.

The petitioner did not testify. For the defense, six witnesses were called, including three character witnesses.[5] Scales' mother testified to conversations in which he had denied any belief or knowledge that the Party advocates violent overthrow (Tr. 1333-34). A member of the faculty of Wesleyan University[6] testified on the nature of Marxism and Leninism, and expressed the opinion that, since 1935, the Communist Party has recognized the possibility of achieving majority political power by means of elections (Tr. 1256-57). *Cf. United States* v. *Mesarosh*, 223 F. 2d. 449, 459-66 (dissenting opinion of Judges Hastie and Maris).

The jury found Scales guilty, and the Trial Court sentenced him to be imprisoned for a term of six years (Pet. App. 3).[7] Thereafter, Scales appealed to the Court of

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[5]These comprised two members of the faculty of the University of North Carolina, and a clergyman from Chapel Hill. A fourth witness, Professor Douglas Maggs of the Duke University Law School, at which Clontz studied, contradicted Clontz' testimony concerning an alleged conversation between them with respect to Scales' legal defense (Tr. 1361-74).

[6]Professor Robert S. Cohen, a teacher of physics and philosophy, who gives courses entitled "Philosophy of American Democracy" and "Philosophy of Marxism".

[7]Inasmuch as the maximum penalty for a conviction of conspiracy to violate the Smith Act is five years, Scales' sentence is greater than has been imposed on any one else under the Smith Act. After the sentencing, Scales was held without bail (which had been fixed at $100,000 at the time of his arrest and subsequently reduced to $35,000 in cash). The order denying bail pending appeal was affirmed by a judge of the Court of Appeals of the Fourth Circuit, but on May 12, 1955, Chief Justice Warren reinstated the previous bail.

Appeals for the Fourth Circuit, on the same general grounds that are the basis of this petition.

The Court of Appeals sustained the constitutionality of the "membership clause" of the Smith Act[8] on the ground that the clause "is, of course, nothing more or less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence"[9] (Appendix A, *infra* p. 33). This conclusion is the more remarkable in that not only does the statutory provision in question make no reference to conspiracy, but this is equally true of the indictment under which Scales was tried (Pet. App. 2-3). Nor are any co-conspirators mentioned in the indictment, nor is any overt act in furtherance of conspiracy charged.[10]

The court below also rejected Scales' contention that his prosecution under the "membership clause" of the Smith Act is barred by Section 4(f) of the Internal Security Act of 1950, which provides that neither membership nor office-holding in the Communist Party shall constitute "per se" a violation of that section "or of any other criminal statute". Totally ignoring the logic and legislative history that require the application of Section 4(f) to just such a proceeding as the present one, the Court of Appeals undertook to distinguish "mere membership" from "membership with knowledge" (Appendix A, *infra* pp. 36-37). Under this

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[8]The Court of Appeals for the Fourth Circuit had already, by way of dictum, sustained the constitutionality of the "membership clause" in *Frankfeld* v. *United States*, 198 F. 2d 679, at 684 and 690. That case involved an indictment under the conspiracy statute and the other provisions of the Smith Act relating to organization and advocacy.

[9]In fact, the Smith Act does not cover conspiracy to overthrow the Government (which is prohibited by an old statute dating from the War Between the States, now 18 U. S. C. 2384), but rather, advocacy, organization of groups, and distribution of literature with the object of overthrowing the Government.

[10]On petition for rehearing, Scales pointed out that, under the theory of the Court of Appeals, he had been convicted of a crime for which he had been neither indicted nor tried. The petition for rehearing was denied by the Court of Appeals without opinion.

decision, the application of Section 4(f) would be restricted to Communist Party members who can prove that they do *not* know the Party as a group that advocates violent overthrow. Since such membership is outside any criminal statutory proscription, Section 4(f) is thus rendered meaningless surplusage.

The Court of Appeals found no merit in Scales' other contentions, based upon the insufficiency of the evidence and errors committed in the course of his indictment and trial. It affirmed the judgment of conviction on November 16, 1955, and a petition for rehearing was denied without further opinion ten days later.

Reasons for Granting the Writ

This case is the first prosecution under the "membership clause" to reach this Court. Two of the questions presented—to wit, the constitutionality of the clause and the applicability of Section 4(f) of the Internal Security Act—are necessarily inherent in any prosecution of a Communist Party member under this provision of the Smith Act. Another such conviction has just been affirmed by the Court of Appeals for the Seventh Circuit,[11] and at least seven others are pending in various federal district courts.[12] The gravity of these questions of Constitutional and federal statutory law seems beyond controversy, as does the importance of their being settled by this Court.

The evidentiary and procedural questions presented are generally similar to those that arose during the trial in the *Lightfoot* case. Equally, if not more important, however,

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[11] *United States* v. *Lightfoot*, No. 11470 in the Court of Appeals for the Seventh Circuit, judgment of conviction affirmed January 12, 1956. The opinion of the Court of Appeals for the Seventh Circuit relies heavily on the opinion in the present case.

[12] *United States* v. *Blumberg* in the Eastern District of Pennsylvania; *United States* v. *Noto* in the Western District of New York; *United States* v. *Weiss*, in the Northern District of Illinois; *United States* v. *Dennis*, No. C128/89, *United States* v. *Winter*, No. C128/98, *United States* v. *Gates*, No. C128/95, and *United States* v. *Davis*, No. C128/93, all in the Southern District of New York.

is the close relation of some of these to questions that have also arisen in several prosecutions for conspiracy to violate the advocacy and organization provisions of the Smith Act. Two such cases are presently in this Court on certiorari.[13] Alike in those two cases and the present one, important issues are raised with respect to the sufficiency of the evidence to show intentions and activities so dangerous as to bring them within the permissible ambit of legislative proscription, as bounded by the First Amendment. This Court has stated that it will review these very questions "with the scrupulous care demanded by our Constitution." *Dennis* v. *United States,* 341 U. S. 494, 516. They are as ripe for review in this case under the "membership clause" as in the conspiracy cases that are now pending here.

1. *Intrinsic Unconstitutionality of the "Membership Clause".* The petitioner is aware that it is the policy of this Court not to decide constitutional questions unless its disposition of the other issues raised in a particular case requires that the constitutional problem be confronted. *Peters* v. *Hobby,* 349 U. S. 331; *United States* v. *Rumely,* 345 U. S. 41. In the present case, there are important non-constitutional issues the disposition of which, it is believed, will in any event require reversal of the decision below. But if this Court should hold otherwise with respect to the non-constitutional questions, or should for some other reason determine to pass upon the constitutional validity of the "membership clause", then it must be held that the clause under which Scales has been convicted is invalid under the First and Fifth Amendments.

We doubt that the Government will deny that the clause restricts the rights of free speech and assembly safeguarded by the First Amendment, and in any event the matter is

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[13] *Yates* v. *United States,* 225 F. 2d 146, certiorari granted October 17, 1955, No. 308; *Mesarosh* v. *United States,* 223 F. 2d 449, certiorari granted December 12, 1955, No. 566.

foreclosed by this Court's decision in *Dennis* v. *United States, supra.* The Court's opinion specified very particularly the elements that were held to justify Congressional limitation on these rights in that case, which involved an indictment for conspiracy to advocate the violent overthrow of our Government and to organize the Communist Party as a group of persons who so advocate.

Two of the critical elements were *advocacy* and *conspiracy.* The provisions of the Smith Act involved in the *Dennis* case, declared the Court (at p. 502), are "directed at advocacy, not discussion." And in holding that those provisions as there applied satisfied the "clear and present danger" test, the Court observed (at p. 511): "It is the existence of the conspiracy which creates the danger".

But neither of these crucial factors is present in this case. Scales has not been indicted or convicted of either advocating or conspiring. The statutory provision under which he has been convicted does not contemplate that the accused be charged either with conspiring or advocating.[14] It is apparent, therefore, that the "membership clause" wholly fails to meet the criteria which, in the *Dennis* case, saved the other provisions of the Smith Act from the prohibition of the First Amendment.

Absent these elements, what is left here is wholly insufficient to satisfy the "clear and present danger" test under any meaningful application of that standard. It should be noted, furthermore, that another necessary element is lacking: that of *intent.* For the "membership clause", unlike the advocacy, distribution, and organization provisions of the Smith Act, does not even require that the accused intends to bring about, or favors, the violent over-

[14]Obviously, the "membership clause" can not be saved by simply treating it as identical with the rest of the Smith Act, as did the court below, in defiance of both the plain wording of the clause and the elementary rule that a statute is to be so construed as to give meaning to all of its provisions.

throw of government.[15] But even if that requirement were to be read into the clause, in violation of its language and logic alike,[16] its constitutionality would not thereby be saved. A state of mind comprising knowledge and intent, but which manifests itself in the external world by nothing more than non-conspiratorial membership in a group, is wholly insufficient to justify so restricted an application of the First Amendment as the punishment of such membership would require. A contrary conclusion would sweep into the discard the "clear and present danger" standard, and destroy the balance between security and freedom which the *Dennis* case and earlier decisions of this Court have sought to achieve thereunder.

Still another concept must be given weight here. No more than many others is the phrase "guilt by association" self-defining, but it is not meaningless. Its meaning is not abstruse: a man may be held criminally liable only for his own conduct, or for the conduct of others in some form of concert or combination which is recognized by our law as warranting holding an individual participant responsible for the acts of other participants. "Membership" is not such a recognized combination. Joint participation in a felony is,

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[15]It goes without saying that this defect could not be cured, as was attempted here, by adding such an allegation to the indictment. Under the language and plain meaning of the "membership clause", this allegation is sheer surplusage. *Thornhill* v. *Alabama*, 310 U. S. 88.

[16]The "distribution" paragraph of the Smith Act expressly requires an intent to overthrow the Government. The "advocacy" and "organization" paragraphs do not, but in the *Dennis* case it was held (at pp. 499-500) that the inherent nature of advocating or organizing for the violent overthrow of government is such as to require "the inclusion of intent as an element of the crime". Clearly this is not true of membership, which may be of an entirely passive nature, involving no other overt action from which intent might reasonably be inferred. Furthermore, had Congress meant to include intent as a necessary element of the "membership clause", it is most unlikely that it would have carefully specified knowledge of the group's purpose (from which intent is not logically to be inferred) as a requirement, and omitted to specify intent (from which knowledge would be logically inferrable).

and so is conspiracy. But courts and legislatures alike have remained awake to the dangers of injustice that surround imputed guilt, and have erected a variety of safeguards against oppressive consequences.

To attach criminal consequences to "membership", unaccompanied by acts or declarations that might bring the charge within the ambit of associative concepts known to our law, would so far extend the notion of imputed guilt as plainly to violate the due process clause of the Fifth Amendment and, in the circumstances of this case, the First Amendment as well.[17] The "dangers to the liberty of the individuals and the integrity of the judicial processes that are inherent in conspiracy charges" were strongly delineated by the late Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U. S. 440, at 457. But at least the dangers of the conspiracy concept are known to and limited by judicial practice. The conspirators must be identified, and the prosecution must prove an agreement among them "to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy". *United States* v. *Falcone*, 311 U. S. 205; see *The Conspiracy Dilemma*, 62 Harv. L. Rev. 276 (1948). There must be evidence of affirmative conduct by the defendant in aid of the criminal agreement among the parties. Flexible as are these requirements, they serve to a degree to specify the conspiracy charge. "Membership", on the other hand, is utterly amorphous.

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[17] John Lord O'Brian, *National Security and Individual Freedom* (1955), at p. 27-28:

> "The Smith Act of 1940 ***made it unlawful*** for any person to be or to become a member of or affiliate with any society, group, or assembly which teaches, advocates, or encourages the overthrow or destruction of any government in the United States by force or violence. These statutes, therefore, imported into our law the alien doctrine of guilt by association, which up to this time had been regarded as abhorrent and which had never been recognized either by the courts or by the Department of Justice, even during the perils and excitements of the First World War."

That there are few precedents in the Court's books merely underlines the novel character of the "membership clause". When occasion has offered, the Court has not hesitated to strike down statutes under which the degree of connection between the defendant, and the alleged criminal conduct of others, was far less tenuous than it may be under the "membership clause". *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; see also *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 402-04.

If the "membership clause" is now to be weighed in the constitutional scales, all these traditional principles manifestly require that it be held invalid under the First and Fifth Amendments.

2. *Effect of Section 4(f) of the Internal Security Act.* In any prosecution of a Communist Party member under the "membership clause", the question of the effect of Section 4(f) of the Internal Security Act of 1950 is posed *in limine*. For if Section 4(f) is given the effect that logical analysis requires and legislative history supports, it is a bar to such prosecutions. Accordingly, the indictments in this and similar cases fail to state an offense under the laws of the United States.

Section 4(f) provides that neither Communist membership nor office-holding "shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute". The court below, relying on the phrase "per se", held (Appendix A, *infra* p. 37) that Section 4(f) does not apply to Communists "who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government". Such membership is not "mere" (i.e.

"per se"; but "with knowledge", and this added element removes it from the scope of Section 4(f).[18]

The effect of this construction, obviously, is to limit Section 4(f) to Communists who do *not* have the stipulated knowledge. But this is wholly incompatible with the structure and purpose of the Internal Security Act in general and Section 4(f) in particular.

Section 2 of the Internal Security Act (50 U. S. C. 781) embodies a "Congressional finding of necessity" in which "Congress finds" that (paragraphs 6 and 15) the Communist movement in the United States, including Communist organizations that "designate themselves as political parties", is "an organization . . . rigidly and ruthlessly disciplined . . . seeking to advance a moment when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . ." in order to set up a "Communist totalitarian dictatorship" which will be "subservient" to other such dictatorships. There is no doubt, in the light of this finding, that Congress in enacting the Internal Security Act regarded the Communist Party as a group of persons who advocate and encourage the violent overthrow of our Government, such as is described in the Smith Act.

Section 4(a) of the Internal Security Act makes it a crime "knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . under the domination or control of any foreign government . . . organization . . .

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[18]The Court of Appeals also relied (Appendix A, *infra* p. 37) on Section 17 of the Internal Security Act (50 U. S. C. 796), which provides that: "The foregoing provisions of this subchapter shall be construed as being in addition to and not in modification of existing criminal statutes". On familiar principles of construction, however, this general provision does not override the specific reference in Section 4(f) to "any other criminal statute". *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204.

or . . . individual". Sections 7 and 8 of the Act (50 U. S. C. 786-87) provide for compulsory registration, under severe criminal penalties for failure, of Communist organizations and members. Especially in view of the "Congressional finding" in Section 2, it is obvious that the registration provisions raise serious questions of self-incrimination for Communist members under Section 4(a). It was in order to deal with this problem that subsection (f) was added to Section 4, as the legislative history indisputably shows.[19]

Now, it is perfectly clear that, whatever may be held to be the legal effect of Section 4(f), its purpose would be entirely frustrated by confining its scope in accordance with the decision below in this case. For the lower court's construction would exclude from its coverage all Communists who know the objectives of the Communist organization to which they belong, as found by Congress in Section 2 of the Act. It would thus be an inevitable consequence of the decision below that Communists who know the Congressionally-found purposes of their organization are given no immunity under Section 4(f) and could plead the privilege against self-incrimination to avoid compliance with the registration provisions, which thus would be binding only on Communists who do *not* know their organization's purposes.

In short, the construction adopted below turns the entire statute into an absurdity. Plainly, membership "per se" means membership without other criminally significant acts or declarations, not membership without knowledge of the

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[19]The original Senate bill (S. 2311, 81st Cong., 1st Sess.) did not contain an immunity provision. The late John W. Davis raised the question of self-incrimination under Section 4(a) in a letter to the Senate Committee (Sen. Rep. No. 1365, 81st Cong., 2nd Sess., pp. 43-44). As a result of the Davis and other letters the Senate Committee added Section 4(f), providing that neither Communist membership nor office-holding should constitute a violation of Sections 4(a) or 4(c), the second of which proscribes the knowing receipt of classified information by Communist officers and members.

purposes of the group. No other interpretation accords with common sense and the plain purpose of the provision.[20]

Furthermore, the legislative history of Section 4(f)—ignored by the court below—shows that Congress specifically intended to protect Communist members and officers against ~~persecution~~ under the membership clause of the Smith Act. As reported out by the Senate Committee, Section 4(f) related only to prosecutions under Sections 4(a) and 4(c) of the Internal Security Act. On the floor of the House of Representatives, this formulation was criticized by Representative Celler as inadequate, in that the protection was not extended to the membership clause of the Smith Act (96 Cong. Rec. 13739).[21] *Thereafter* the House adopted the amendment adding the words "or of any other criminal statute" (96 Cong. Rec. 13761), which was later included in the conference report and became part of the Act as passed into law.

Perhaps to say more is to heap Ossa on Pelion. At this risk, it may be added that in 1954 Congress, during the debates on the bill that became the Communist Control Act of 1954 (50 U. S. C. 841-844), again manifested its understanding that Section 4(f) of the Internal Security Act bars the prosecution of Communists for membership with knowledge. To the original bill (S. 3706, 83rd Cong. 2nd Sess.), Senator Humphrey offered an amendment containing a Congressional finding (parallel to that in Section 2 of

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[20] *Cf. United States* v. *Ginn*, 222 F. 2d 289, at 290-91. It should also be noted that both Sections 4(a) and 4(c) make knowledge an element of the crimes they proscribe, so that if Section 4(f) were construed to cover only membership without knowledge, it would be operative only with respect to persons who would not in any event be liable under Sections 4(a) and 4(c). This applies equally to the membership clause of the Smith Act, which punishes membership only if accompanied by knowledge, so that the phrase "of any other criminal statute" would likewise be robbed of all operative effect.

[21] The same point was made in the Senate Committee minority report (Sen. Rep. No. 2369, Part 2, 81st Cong. 2nd Sess., pp. 12-13) and in the debate on the Senate floor by Senators Kefauver and Humphrey (96 Cong. Rec. 14479, 15198).

the Internal Security Act) that the Communist Party aims to overthrow the Government by force and violence, and a criminal proscription of membership in the Communist Party with knowledge of its purposes. 100 Cong. Rec. 13557-58. This, of course, was substantially the same as the "membership clause" of the Smith Act.[22]

Had the penal provisions of the Humphrey amendment been enacted, they might have operated as a *pro tanto* repeal or modification of Section 4(f) of the Internal Security Act—i.e., they might have reinstated the liability of Communists to prosecution for membership with knowledge under the new legislation *or* under the membership clause of the Smith Act. This, in turn, would have greatly fortified the plea of self-incrimination by Communist Party members under the registration provisions of the Internal Security Act—the very eventuality which it was the purpose of Section 4(f) to avoid. In short, Congress confronted in 1954 the identical problem it had confronted in 1950.

And so, as a result of representations from the Attorney-General and objections from many Senators and Representatives (*e.g.* 100 Cong. Rec. 13836, 13956, 14041) the criminal sanctions for membership were stricken from the Humphrey Amendment, and thus Section 4(f) of the Internal Security Act was left intact and operative to bar the prosecution of Communists for mere membership with knowledge, whether under that Act, the membership clause of the Smith Act,[23] or "any other criminal statute".

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[22]The principal difference, irrelevant here, was that, since the Communist Party was specifically named in the Humphrey Amendment, presumably no proof of its violent purposes would have been required.

[23]In *United States* v. *Yates*, *supra*, the court remarked (at p. 153) that Section 4(f) "made a change in the law previously", apparently referring to the Smith Act. This observation is in conflict with the view of the court below (Appendix A, *infra*, p. 37) that Section 4(f) effected "no modification of the provisions of the Smith Act." *Cf. United States* v. *Mesarosh*, *supra*, at p. 452.

Accordingly, the indictment does not charge the petitioner with any offense under the laws of the United States, and the judgment below must be reversed.

3. *Sufficiency of the Evidence.* In affirming the convictions of the defendants in the *Dennis* case, the only Smith Act proceeding that has as yet been reviewed here, this Court stated (at p. 516): "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." In accordance with this declaration, the Court has recently undertaken to review two cases (*Yates* and *Mesarosh*, *supra*) where such doubts have been raised. They are raised even more sharply in the case of Scales.

Intent, activities, and power of evil must be gauged by reference to the indictment and the evidence. The sufficiency of these is a Constitutional as well as a statutory question. It is Constitutional because, under the rule in the *Dennis* case, the Smith Act's impingement on the First Amendment is warranted only in cases where the evidence sufficiently establishes intent, activities, and power of evil that constitute a "clear and present danger". Reexamination and particularization of the *Dennis* rule is urgently required for the guidance of the lower federal courts in their disposition of the numerous Smith Act prosecutions that are pending.[24]

Whatever difficulties and close questions the evidence may present in other Smith Act cases, there are few here. No conspiracy has been charged and proved, nor has any advocacy or incitement. To be sure, no such charge or proof is required under the "membership clause", but this circumstance does not enhance the sufficiency of the evidence for First Amendment purposes.

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[24] In addition to the "membership" cases listed *supra*, note 12, and the two conspiracy cases pending here on certiorari, there are at least eight conspiracy cases pending in the several federal courts of appeals, and three conspiracy trials are pending in the federal district courts (Connecticut, Ohio, and Porto Rico).

Furthermore, the evidence with respect to Scales' knowledge (required by the clause) and intent (not required by the clause but Constitutionally necessary) is so stale and sparse as to be plainly insufficient for either Constitutional or statutory purposes. The only testimony relating to any declaration by the defendant or in his presence, wherein overthrow of the Government by force is directly adverted to, concerns a conversation (Appendix A, *infra*, pp. 38-40) in December, 1948—nearly six years before indictment and three before the limitations period—under circumstances casting such doubt on the credibility of the testimony[25] that it can not possibly support the judgment of conviction. The testimony of the single prosecution witness, Childs (Pet. App. 14-43, Govt. App. 55-60), who participated with Scales in Party affairs during the limitations period, concerns activities that are highly controversial and declarations that are certainly anathema to most Americans, but contains nothing that could possibly support Scales' conviction under the Smith Act.

In the upshot, the prosecution's case amounted to little more than Lautner's testimony about the aims of the Party (none of which was connected with Scales) and that of Clontz and Childs about Party activities and declarations in North Carolina which the jury no doubt found incomprehensible and repugnant, but which were not shown to be unlawful or directed to unlawful ends. There was little to support the verdict other than inferences that might be drawn from Scales' Party membership and office-holding, and these are not sufficient under the Constitution or the

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[25] Scales' alleged statements were said to have been made during his second meeting, and first conversation about the aims of the Party (Tr. 825-26), with Clontz, an observer for the Federal Bureau of Investigation. Although Clontz saw Scales frequently for the next two years and joined the Party in 1950, he testified to no subsequent declarations of this sort. Assuming that Scales harbored a predilection for violent overthrow, it is most unlikely that he would have revealed it to Clontz as almost a complete stranger in 1948, but never to him as a fellow Party member thereafter.

Smith Act as expounded in the *Dennis* case. As was observed by Justice Reed, dissenting in *Bridges* v. *United States*, 346 U. S. 209, at 234, "there is no necessary identity in law between Communist Party members and such persons" (referring to persons debarred from naturalization for advocacy of the violent overthrow of Government).

Finally, the prosecution's evidence in this case with respect to the aims and purposes of the Communist Party falls far short of the standards of proof applied in courts of law. Whatever one's personal views on this subject may be, when the Government brings a charge against a Communist under the Smith Act, the charge must be proved.

The Government's principal witness in this matter, Lautner, left the Party in January, 1950, almost two years before the statutory period covered by the indictment. In the conspiracy cases under the Smith Act, testimony antedating the limitations period has been admitted on the theory of a continuing state of facts, but it has never been held sufficient *standing alone* to support the ultimate conclusion.[26]

Taken at face value, Lautner's testimony on the crucial issue of advocacy of force and violence was reduced on cross-examination to an expression of personal opinion that the Party advocates forceful overthrow, despite contrary statements by various Party officials and in Party publications (Tr. 498-99, 511-12). This witness, who frequently takes the stand for the Government in Smith Act and other cases where the nature of the the Party is an issue, also testified in the *Mesarosh* case, *supra*. Judge Hastie, dissenting,[27] concluded that (223 F. 2d 449, at 463-64):

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[26] As strongly indicating the contrary, see *United States* v. *Dennis*, 183 F. 2d 201, 231: "It is *toto coelo* a different question whether we are treating them [circumstances prior to the statutory period] as *media concludendi*, or as the *factum* itself". See also *United States* v. *Lustig*, 16 F. R. D. 378, 379: "It cannot be said with any degree of certainty that the aims and objectives of the Communist Party over a period of many years were identical".

[27] Judge Maris concurred in Judge Hastie's opinion.

"... Lautner's opinion was given merely in terms of a generalized revolutionary goal of the Communist group. ...

"Lautner did not point to a single thing indicating that the 1945 program contemplated, beyond inculcation of belief in and approval of an ultimate revolution, teaching that the time had now come to work for the overthrow of the existing government as soon as possible. ...

"If Lautner did not indicate any proximity of the violence against government said to be contemplated by the 1945 program, I have not found such evidence elsewhere in the record."

It is on the basis of such slender evidence of Party aims, and without any proof of violent intentions, or knowledge of or participation in unlawful activities, that Scales has been convicted and sentenced to prison for six years. If the evidentiary standards announced in the *Dennis* case are to retain any practical significance, this judgment must be reversed.

4. *Prejudicial Errors in the Course of the Indictment and Trial.* Petitioner's indictment and trial were vitiated by numerous prejudicial errors, of which four are of such general importance as to warrant review and correction by this Court.

(A) The grand jury was illegally impanelled. Prior to the trial, petitioner filed a motion challenging the grand jury panel which returned the indictment.[28] The hearing showed that the method for securing names for the panel was that the clerks and jury commissioner requested various individuals[29] to provide the names of persons who were

[28]Reference is made in this section 4(A) of the petition to the separately paginated transcript of the preliminary proceedings on motions in the District Court. These are designated "Mot. Tr,".

[29]Among those solicited were local sheriffs, superintendents of public schools, bank presidents and the Chairmen of the Republican and Democratic parties in the counties in the District.

"suitable . . . for jury service" (Mot. Tr. 18-24). The only information received by the jury commission concerning these prospective jurors was their names and addresses. No questionnaires were ever sent to the members of the jury panel prior to placing their names in the box, nor were the individuals who were asked to supply names for jury service ever informed of the qualifications for jurors (Mot. Tr. 34-36).

This method of selecting jurors is an illegal delegation of the clerk's and jury commissioner's duties. *Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Murphy*, 224 Fed. 554. It also results in a jury panel that is not a fair cross-section of the community. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217. The applicable statute (28 U. S. C. 1864) provides that: "The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing." Here, there is no way of showing whether or not the names of three hundred qualified persons are in the jury box, since the jury commission knew only the names and addresses of the potential jurors.[30]

The method of impanelling the jury in this case has prejudiced the defendant and worked harm to the jury system and the processes of our courts. *Ballard* v. *United States*, 329 U. S. 187, 195. This Court, in the exercise of its responsibility to supervise the administration of justice in the federal courts, should dismiss the indictment.

(B) The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal

[30]In a similar case in the District Court of Connecticut, a challenge to the grand jury panel was upheld and the indictment dismissed. *United States* v. *Silverman*, 129 F. Supp. 496. The court held (at p. 511): "The failure of the jury commission to have determined that there were at least three hundred qualified names in the box at the time of the drawing of the grand jury . . . was a breach of the affirmative statutory duty imposed upon the commission and is fatal to the indictment . . .".

Security Act of 1950 (50 U. S. C. 781) deprived the petitioner of the opportunity for a fair and impartial trial. The findings in the latter statute have already been described.[31] The former finds that the Communist Party "is in fact an instrumentality of a conspiracy to overthrow the government of the United States" and is dedicated "to the proposition that the present constitutional government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence".

The indictment here charges and the Government offered proof that the Communist Party advocates the violent overthrow of the government. On this issue of fact, the defendant was entitled to a fair trial, before a jury able to reach an independent, objective and impartial verdict on the evidence. *Cf. Moore* v. *Dempsey*, 261 U. S. 86; *Frank* v. *Mangum*, 237 U. S. 309; *Manley* v. *Georgia*, 279 U. S. 1. For the jury here to find that the Communist Party does not advocate the violent overthrow of the government, it would have had to flout the Congressional finding.

In the face of this Congressional finding, it was impossible for the jury to determine the question of violent overthrow on the basis of an independent, objective and impartial viewing of the evidence. *Cf. Delaney* v. *United States*, 199 F. 2d 107.

(C) The trial court erred in denying the defendant's request, under Rule 17(c) of the Federal Rules of Criminal Procedure, to examine the written statements previously furnished to the Federal Bureau of Investigation by the prosecution witnesses Clontz and Childs. Instead, the trial judge examined these statements *in camera* to determine whether there were any inconsistencies between the reports and the testimony, but stated that he would not consider an

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[31] *Supra*, p. 13.

omission as an inconsistency (Tr. 1161). The judge found no inconsistency.

This procedure was plainly prejudicial to the defendant, and conflicts with this Court's decision in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214. See also *Fryer* v. *United States*, 207 F. 2d 134; *United States* v. *Bryson*, 16 F. R. D. 431; *United States* v. *Schneiderman*, 106 F. Supp. 731.[32]

(D) There was highly prejudicial error in the admission at the trial of incompetent, irrelevant, remote and inflammatory testimony. The court admitted a large volume of inflammatory evidence concerning teachings of the Communist Party that bore no reasonable relation to the issue of force and violence. Such matters included the Party's attitude toward the Negro and his status in the South (Govt. App. 32-33 and 37; Pet. App. 26-28 and 41) and toward the war in Korea (Pet. App. 29 and 33). Furthermore, prosecution witnesses were permitted to describe incidents that bore in no way on the issues, but were extremely prejudicial in their general effect. Clontz, for example, was permitted to testify in detail about the circumstances surrounding an appearance at the University of North Carolina by John Gates, editor of the Communist publication *Daily Worker* (Tr. 596-97 and 1433).

Even more serious was the trial court's admission of extensive testimony by Lautner and Clontz concerning acts and declarations of third persons that did not take place in Scales' presence. The competence and relevance of any of

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[32] In *United States* v. *Lebron*, 222 F. 2d 531, the Court of Appeals for the Second Circuit upheld the trial court's refusal to allow the defendant to examine such statements, after he had read them and found nothing inconsistent. But it was required that the statements be sealed and made a permanent part of the record, so that the appellate court could itself determine whether there were any inconsistencies.

this third-party testimony is dubious at best,[38] inasmuch as the governing issue was Scales' knowledge of the Party's aims, and evidence of other persons' acts or declarations bearing on that issue would be competent only if shown to be in the presence or range of perception of the accused.

However that may be, the incompetence and prejudicial remoteness of a great deal of the third-party testimony is indisputable. For example, Clontz was permitted over objection to testify about his experience at the Jefferson School in New York City (Tr. 656-65), hundreds of miles from Scales in North Carolina. Lautner testified extensively about declarations and publications of third parties at New York and other places utterly remote from Scales and his sphere of activities.

All of this served no purpose germane to the issues, but its inevitable effect was to excite animosity against Scales and inflame the jurors' emotions. By the erroneous admission of such testimony, petitioner was deprived of a fair and impartial trial, and his conviction must be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

TELFORD TAYLOR
New York, N. Y.

January, 1956.

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[38]The court below justified the admission of this evidence by separating the factual issue of the Party's aims from the issue of Scales' knowledge of those aims. Such a theory might be valid in dealing with a precisely determinable issue of physical fact (such as whether the victim of a murder was or was not over six feet tall), but is highly questionable in its application to the issue of an accused's knowledge of the aims of the members of a group.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7016.

JUNIUS IRVING SCALES, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

(Argued October 4, 1955. Decided November 7, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

David Rein for Appellant, and Edwin M. Stanley, United States Attorney, and Kevin T. Maroney, Attorney, Department of Justice, (William F. Tompkins, Assistant United States Attorney, John H. Davitt and William G. Hundley, Attorneys, Department of Justice, on Brief) for Appellee.

PARKER, Chief Judge:

This is an appeal in a criminal case by a defendant who has been convicted of violation of section 2 of the Smith Act of June 28, 1940, 54 Stat. 670, 671, 18 USCA 2385.

That section, as brought forward in the United States Code, is as follows:

> "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
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> "Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—
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> "Shall be fined not more than $10,000 or imprisoned not more than ten years or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

The indictment, which was returned on November 18, 1954, charged that the Communist Party of the United

States of America has at all times been "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit" and that the defendant Scales "had been a member of said Communist Party from January 1946 up to the filing of the indictment well knowing during all of said period that said Communist Party of the United States of America was and is a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, and said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit."

The evidence in the record amply sustained the charge in the indictment. There was evidence, similar to that in *Dennis* v. *United States,* 2 Cir. 183 F. 2d 201, 341 U. S. 494, and *Frankfeld* v. *United States,* 4 Cir. 198 F. 2d 679, to the effect that the Communist Party advocates the overthrow of the Government of the United States by force and violence. It was admitted that defendant Scales was a member of the party during the period covered by the indictment and was chairman of the North and South Carolina District of the party; and there was ample evidence that he knew of its purpose to overthrow the government by force and violence, that he approved of that purpose and that he had so expressed himself to witnesses who testified on the trial.

The case was submitted to the jury in a charge which clearly excluded any possibility of "guilt by association". The jury was expressly instructed that, before there could be a conviction of defendant, four things must be proved beyond a reasonable doubt: (1) That the Communist Party of the United States was a group teaching or advocating

the destruction or overthrow of the Government of the United States by force and violence, (2) that the defendant was a member of the party, (3) that, while a member of the party, he well knew of its teachings and purposes and (4) that he himself intended to bring about the overthrow of the Government of the United States by force and violence. In addition to this the trial judge carefully explained that the defendant could not be convicted merely because he was a member of the Communist Party but only upon a finding that he knew of and participated in the purpose of the party to overthrow the government by force and violence, saying:

> "First, it is not criminal for any person or group to hold or express the belief that the Government of the United States should be completely changed. It is not criminal for any person or group to have such a change of government as a purpose or aim. It is not criminal to publicly advocate and urge such a change by peaceable and constitutional means. It is not criminal to criticize the Government and its policies, foreign and domestic, or to praise the policies of other governments, and this is true regardless of whether you agree or disagree with the truth or falsity of such criticism or praise. Nor is it criminal for the Communist Party or anyone else to teach that should a change in our form of government be made and accomplished by peaceable and constitutional means, and thereafter the new government should be resisted by force and violence, then the new government would be justified in using force and violence to subdue such resistance; that is, if the change had been made by peaceful and constitutional means, the new government would have the right to protect itself against any other change save by peaceful, constitutional means.

"You cannot convict the defendant merely because he was a member or an officer of the Communist Party, no matter what were the principles and teachings of the Party; for membership alone is not a crime. Moreover, the teaching in the abstract, or teaching objectively, that is, teaching, discussing, explaining or expounding, what is meant by the aim or purpose of any group or society of overthrowing the Government by force and violence, is not criminal. For example, study and discussion by the Communist Party or in school classrooms, or study groups, or public meetings, with the object of informing the participants or the audience of such aims and purposes of the doctrines of Marx, Lenin or Stalin, is entirely lawful. But it is criminal to advocate or urge the overthrow by force or violence of the Government at the opportune time. * * *.

"It is in this understanding, and in this understanding only, that you must determine whether the evidence shows beyond a reasonable doubt that the Communist Party of the United States of America was a group or society teaching and advocating the overthrow and destruction of the Government by force and violence as soon as permitted. If you are not convinced beyond a reasonable doubt that the Communist Party of the United States was such a group, that is, a group that urged and advocated the overthrow, then you can not find the defendant guilty and should acquit him without consideration of the remainder of the elements of the crime.

"But, on the other hand, if you believe beyond a reasonable doubt that the Communist Party was such a group, then you should next consider whether the defendant, Scales, was a member or affiliated with the

Party and the Court tells you, by the way, that that is admitted; he admits that he was a member of the Party. You must consider, secondly, whether he had knowledge of the aims and purposes of this Party, and, thirdly, whether on his part, he specifically intended to accomplish the overthrow of the Government by force and violence as soon as practicable.

"To emphasize those points: To be punishable, the membership must have been within the period of November 18, 1951, to November 18, 1954. Earlier membership would not be covered by this indictment. It is barred, as not punishable, by the Statute of Limitations.

"Knowledge by the defendant of the Party purposes must accompany the membership in order for the membership to be criminal, and that knowledge too must have existed during the three-year period.

"And a specific intent, as I have already indicated to you, on the part of the accused to bring about the overthrow of the Government is also necessary and an indispensable requisite of the offense. Again, the intent must have existed during the three-year period.

* * * *

"If you have found beyond a reasonable doubt that the Communist Party of the United States was a group or society teaching or advocating the overthrow of the Government by force and violence at the propitious time, but you are not convinced beyond a reasonable doubt that the defendant knew of its purposes, or you are not convinced that he himself had the intent to accomplish that purpose, then you must find him not guilty, because those elements are just as indispensable to the offense as the aims and purpose of the Communist Party."

The principal contentions of defendant upon this appeal are: (1) that the act under which he is indicted is unconstitutional and void; (2) that prosecution of the offense charged is barred by section 4(f) of the Internal Security Act 50 USC 783(f); and (3) that the court erred in admitting and allowing the jury to consider evidence tending to show the purpose of the Communist Party to overthrow the government by force and violence, where such evidence did not consist of statements made by defendant or in his presence or related to matters occurring prior to the three year limitation period preceding the finding of the bill of indictment. Other points of minor importance are raised relating to the regularity and fairness of the trial which have been duly considered and which will be referred to after we have dealt with these three principal questions.

1. *The Constitutionality of the Statute.*

The portion of the statute here applicable is the third paragraph of section 2385 of Title 18 of the United States Code, quoted above, relating to membership in a group advocating the overthrow of the government by force and violence by one who becomes or remains a member thereof knowing of its criminal purposes. In the light of the decisions in the Dennis and Frankfeld cases, supra, we think there can be no doubt as to the constitutionality of this provision of the statute. It is said that those cases related to conspiracy; but the conspiracy charged was conspiracy to violate the statute and the validity of its provisions was necessarily involved and was expressly passed upon in the light of the same arguments relating to "guilt by association" and "clear and present danger" that are made here. In the Frankfeld case we said (198 F. 2d at 683-684):

> "Defendants argue that, even though the Smith Act be not unconstitutional in its entirety, the 'membership' and 'literature' provisions of the act must be

held invalid and that this invalidates their conviction, since violation of these provisions was charged as being among the objects of the conspiracy. What was said by the Supreme Court in the Dennis case, is a sufficient answer to this argument. There is no distinction in principal between advocating through the printing and distribution of literature the destruction or overthrow of the government and advocating it by word of mouth. So far as 'membership' in an organization advocating such destruction or overthrow is concerned, such membership is condemned only where there is knowledge on the part of the accused of the unlawful purpose of the organization. Membership in an organization renders aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged. Certainly it is within the power of Congress to forbid the circulation of literature advocating the forcible overthrow or destruction of the government or membership in an organization having such destruction as its purpose, where there is knowledge of such purpose on the part of one accepting or retaining such membership.

"The defendants contend that these provisions of the statute are unconstitutional because they do not require a 'clear and present danger' as a condition of criminality; but it would be little short of absurd for a statute to forbid advocacy of the destruction of the government or membership in an organization formed for the purpose of such advocacy only in the event that they result in 'clear and present danger'.

> This would be to make the near success of an attempted crime the criterion of criminality for making the attempt."

The membership clause of the statute is, of course, nothing more or less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes and that all are guilty who join it with knowledge of such purposes; and all that the statute does is apply this fundamental concept of conspiracy to an organization having for its purpose the forcible overthrow of the government. This was considered in the Frankfeld case, where we said (198 F. 2d 689): "If it be argued that the crime defined by section 2(3) is in essence the crime of conspiracy, the position of the defendants is not helped; for the result would be merely that such conspiracy is thus made criminal by two sections of the act." As the effect of the membership clause is to define as well as make criminal a conspiracy to overthrow the government, all that was said in the Dennis and Frankfeld cases as to the validity of the statute is pertinent here. In the Frankfeld case we said (198 F. 2d 682):

> "The question presented is not one as to freedom of speech or as to the right to organize for proper political purposes, but goes to the power of the government to outlaw and punish conspiracies whose purpose it is to overthrow the government itself by force and violence. Modern history is replete with instances of the danger to the government inherent in such conspiracies; and there is nothing in the Constitution or in any sound political theory which forbids it to take effective action against that danger. If it may take action to protect itself from being overthrown by force and violence, it necessarily follows that it may

forbid conspiracies having that end in view and may punish such conspiracies as criminal. In the absence of conspiracy the 'clear and present danger' rule may furnish a satisfactory criterion of criminality in the case of ordinary speeches advocating force and violence; but such rule has no practical application to advocacy of violence in connection with conspiracies to overthrow the government, for the danger of such conspiracies is ever 'clear and present'. They are pregnant with potential evil, which, while hidden from view in normal times, is likely to assert itself as an irresistible force when some national crisis presents an opportunity for a putsch or a coup d' etat."

In the Dennis case, the late Chief Justice Vinson, speaking for the Supreme Court, answered in the following language the argument that the statute must be held invalid in application of the "clear and present danger" rule:

"Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of

inadequate numbers or power of the revolutionist, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. * * *

"Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled wtih the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. Cf. *Pinkerton* v. *United States*, 1946, 328 U. S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489; *Goldman* v. *United States*, 1918, 245 U. S. 474, 38 S. Ct. 166, 62 L. Ed. 410; *United States* v. *Rabinowich*, 1915, 238 U. S. 78, 35 S. Ct. 682, 59 L. Ed. 1211. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."

In his concurring opinion in the Dennis case, the late Mr. Justice Jackson pithily observed:

> "But it is not forbidden to put down force or violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose.
>
> * * * *
>
> "There is no constitutional right to 'gang up' on the Government."

"Guilt by association" is not punished by the statute; for knowledge of the criminal purpose of the organization is made a condition of guilt in joining it. The "clear and present danger" rule has no application to the statute, since what it denounces is a conspiracy to overthrow the government by violence; and Congress may unquestionably forbid incitement to crime and organization for that purpose and may make such organization criminal, irrespective of the immediacy of the danger resulting from such organization.

2. *Effect of the Internal Security Act.*

Defendant relies upon section 4(f) of the Internal Security Act otherwise known as the Subversive Activities Control Act of 1950, 61 Stat. 987, 991, 50 USC 783(f), which provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." The purpose of this provision, as defendant correctly argues, was to insure the enforceability of the registration provisions of the act by making the privilege against self incrimination unavailable as a defense to failure to register. The language of the section relied on, however, provides merely that neither holding of office nor membership in a Communist organization shall constitute per se a violation

of a criminal statute. It does not purport to exempt from criminal liability membership in an organization advocating the overthrow of the government by force and violence where such membership is acquired or held with knowledge of the criminal purpose in which the organization is engaged. In other words, mere membership in the party is not a crime. Membership with knowledge of the criminal purpose of the organization remains a crime.

Whether the effect of the language used is to make the privilege against self incrimination unavailable to those who fail to register as required by the act, we need not stop to inquire. It is clear that the language used does not exempt from criminal prosecution members of the Communist party who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government. Even though the Communist Party has such purpose, membership per se is not made a crime under the Smith Act; and it is only membership per se, which is exempted from criminal prosecution under section 4(f) of the Internal Security Act. That no modification of the provisions of the Smith Act was intended by Congress in the passage of the Internal Security Act of 1950 is made abundantly clear by section 17 of the Internal Security Act, 64 Stat. 1003, 50 USC 795, which provides: "The foregoing provisions of this title shall be in addition to and not in modification of existing criminal statutes". In view of this interpretation which Congress itself placed on the statute at the time of its passage, there is no occasion for further discussion as to its effect upon the Smith Act. The charge of the court, heretofore quoted, made it clear that defendant could not be convicted because of mere membership in the party.

3. *The Evidentiary Questions.*

Defendant complains that the trial judge admitted and allowed the jury to consider evidence relating to the aims

and purposes of the Communist Party by documents and teachings with which he was not connected, that some of this related to aims and purposes other than the use of force and violence and that a considerable part of it related to publications and teachings prior to the three year limitation period preceding the finding of the indictment. We think that this complaint is entirely without merit. The evidence as to the teachings carried on by the party and the documents used in the teaching was clearly competent to show the aims and purposes of the party; that which related to infiltration, subversion and the arousing of dissension had a direct bearing on the purpose to overthrow the government by force and violence when a favorable opportunity should present itself; and the fact that some of the evidence related to the period preceding the limitation period was no objection to its admissibility, since there was no evidence of any change in the aims and purposes of the party in the meantime and the evidence introduced clearly indicated that there had been no such change. Of course, the defendant could not be convicted unless he was shown to have had knowledge of its aims and purposes and the jury was clearly so instructed; but there was ample evidence to estabish such knowledge on his part. Aside from the fact that he was chairman of the party in North and South Carolina and on account of his position is reasonably presumed to have known its aims and purposes, there is direct evidence that he did have such knowledge. Thus, in a conversation with the witness Clontz, when Clontz, after reading the communist literature advocating revolution which defendant had furnished him, inquired whether communism could not be brought to the people of the United States through a process of education, defendant replied in the negative and said that the use of force was the only answer. Clontz's testimony with respect to this conversation is as follows:

> "Additionally then I posed to Scales the question, If you can have a publishing company and if Commu-

nism is the better form of government and the better way of life, why can't we bring Communism here to the United States by educating the people, by showing them that this is the best form of government?

"Scales answered me that was entirely fallacious, that that would never work, that in the first place the Government of the United States owned all the media of communication, the newspapers, . . . the—I don't believe he mentioned television—but the newspapers and radio and other similar mediums; they controlled the schools, the other institutions of Government and that they would not permit the masses of people to learn the truth about this Communism, that in order to get the truth to the people you would first have to destroy the Government and destroy the mediums of communication control and destroy the institutions of Government, that Stalin and his followers had proved conclusively that ideas alone would never change the form of government or would never do anything. He said that it would be nice if revolution happened automatically but, he said, that unfortunately they didn't, that a small militant force had to bring about a change in government by revolution.

"I recall he said that that is where we, the Communist Party, come in. He said that Engels, the philosopher of some kind, that collaborated with Karl Marx, had felt that when the revolution comes about, Government would just disintegrate and the people would just sort of run things very loosely. He said that Lenin had proved that that didn't follow, that when the revolution took place in the Soviet Union in Russia, that Lenin had taken the

police power, that the Czar had used that police power to consolidate his position and as Junius put it, to protect the masses of the people from the encroachment of the foreign capitalist countries that would try to come in and prevent the revolution.

"Scales said, and it made quite an impression on me, that force is the only answer, that ideas alone can never accomplish anything.

"That was the substance of our conversation at that time."

In a later conversation with Clontz on the subject of what aid could be expected from the Soviet Union in case of revolution, defendant said, according to Clontz's testimony:

"I recall during one of these meetings in the spring of 1950 Scales brought up the question of permanent revolution. Permanent revolution was defined by Scales as the concept that the Soviet Union and the Communist Party in the Soviet Union were not through with their job after they had achieved Socialism. In the Soviet Union they had a continuing obligation. He said that when the Soviet Union Communist Party had brought about a revolution and had brought Socialism there to the Soviet Union, they still were obligated under Stalin's teachings and under common sense, as he put it, to continue assisting the Communist Party all over the world until they had overthrown the capitalist governments including that of the United States that would threaten Communists, Communism and Socialism, unless they were overthrown.

"Now I asked Scales, Does that mean that when the day of the revolution comes, Soviet Union is going to land troops?

"Scales' answer to that was that as a practical matter the Soviet Union would not land troops at the commencement of the revolution, that the Communists here in the United States would have to start the revolution themselves. He pointed out that the Communist Party in the Soviet Union had learned through experience in China that direct Soviet Union guidance immediately in the form of leadership was not desirable. He said they sent a general over to China during the time the Chinese Revolution was taking place, and this Russian General that was sent over by the Communist Party resulted in having the troops completely routed, that Mao, the Chinese leader there in China had never been to the Soviet Union in his life at that period of time in 1950, but that instead the Soviet Union had sent political advisors over to educate him in the proper Communist technique, and had furnished them assistance through their military advisers and that sort of thing. He said that once the revolution was started, if it began to look as though the police power of this country would be used against the working class in the Communist Party, then certainly the 'mother country' as he called the Soviet Union, could not stand by and see that happen but would have to land troops to protect us."

Defendant did not take the stand to deny either of these statements or to testify to any change of views on his part. Standing uncontradicted, they clearly established knowledge by defendant of the unlawful purposes of the party within the limitation period as well as prior thereto, since the running of the statute of limitations cannot empty a man's mind of knowledge of this sort. When defendant remained chairman of the party in the North and South Carolina district during the limitation period, he did so

with clear knowledge of its purposes, as revealed in these conversations. Added to this is the testimony of Clontz that in December 1951, within the limitation period defendant informed him that he, the defendant, was going "underground" and that, on the orders of the party, Clontz was not to use the telephone, the telegraph or the mails in communication with him.

It was not necessary to his guilt that the defendant take part in the teaching or have a hand in the preparation of the documents of the Communist Party or even that he be shown to be familiar with the documents. All that it was necessary to show was that the party did advocate the overthrow of the government by force and violence and that he became or remained a member during the period not barred by the statute of limitations with knowledge of that unlawful purpose. The evidence objected to on the ground that it was res enter alois acta was clearly competent to establish the unlawful aims and purpose of the party. With respect to that which showed knowledge prior to the statute of limitations, this was clearly competent as scienter and intent were elements of the offense. See *United States* v. *Mesarosh* 3 Cir. 223 F. 2d 449; *United States* v. *Schneiderman* 106 F. Supp. 892, 897. There can be no question but that the evidence objected to is competent in a conspiracy case. See *United States* v. *Flynn*, 2 Cir., 216 F. 2d 354; *Short* v. *United States* 4 Cir. 91 F. 2d 614, 618; *Cameriato* v. *United States* 4 Cir. 58 F. 2d 557, 558. And as pointed out above, a charge under the membership clause of the Smith Act is a charge of conspiracy. There is no magic in the use of the word "conspiracy" or "conspire"; and to charge that defendant became or remained a member of an organization advocating the forcible overthrow of the government is to charge that he became a party to an unlawful conspiracy for the purpose and makes applicable the rules relating to proof of guilt in joining a conspiracy.

4. *Other Contentions.*

Other contentions of defendant may be dealt with briefly. The contention that the evidence was not sufficient to sustain the verdict is manifestly so lacking in merit, in view of what has been said, as not to warrant further discussion. The requested prayers for instruction were properly declined as the law was fully covered in the court's charge in a light as favorable to the defendant as could possibly have been given, and the requested instructions would have served no purpose except to confuse the jury. The government's summation did not exceed the comment that is reasonably to be expected in jury arguments and the trial judge expressly instructed the jury that "the statements and arguments of the attorneys do not constitute evidence in the case." It is elementary that whether a mistrial shall be declared because of arguments of counsel is a matter resting in the sound discretion of the trial judge; and, certainly, there was no evidence of any abuse of discretion here.

The defendant's challenge to the grand jury on the ground that the clerk of the court and the jury commissioner had delegated their functions to others is without merit. The fact that they asked leaders of various organizations to furnish them with names of persons qualified to serve as jurors is unimportant so long as they themselves made the decision as to what names should go in the box. There is nothing to indicate that the persons whose names were placed in the jury box did not represent a fair cross section of the community or that defendant was prejudiced in any way by the method of selection. The questions propounded by the judge to the trial jury on the voir dire were sufficient for the selection of an impartial jury and that was all that defendant had a right to ask. The form of the questions to be propounded for that purpose is a matter resting in the discretion of the trial judge. *Dennis* v. *United States* 2 Cir. 183 F. 2d 201, 226. Defendant complains because the

judge did not excuse for cause three of the jurors who were subsequently peremptorily excused in the exercise of defendant's right to strike. The judge found, however, that these were impartial jurors and we would not be justified in setting aside his finding with regard thereto. *Reynolds* v. *United States* 98 U. S. 145, 156.

Defendant complains because the judge denied his request that his counsel be furnished with F. B. I. reports to the Department of Justice as to statements of the witnesses Clontz and Childs and that the selective service file of Childs be produced for examination by his counsel. These requests were properly denied. As to the F. B. I. reports on the statements of Clontz and Childs, there was no suggestion that they contained anything contradictory of testimony given by these witnesses on the trial, and the trial judge, who examined the statements, held that there was nothing in them contradictory of that testimony. There is nothing in the Constitution or elsewhere that permits a defendant to conduct a fishing expedition of the sort here proposed. The Constitution guarantees to a defendant accused of crime the right to be confronted by the witnesses against him, not the right to rummage through the secret files of the government in the hope that he may possibly find something contradictory of such witnesses. The same may be said with added force as to the selective service file of Childs, where the purpose was to rummage through a confidential file of the government in the hope of finding something that might contradict a witness as to a collateral matter. There is nothing to the contrary in *Gordon* v. *United States* 344 U. S. 414. There a key witness for the government had admitted on cross examination that he had given statements contradictory of his testimony to government agents and that sentence on him had been withheld for complicity in the same crime by the judge who advised him to tell the whole story

to the probation officers even though it might involve others. The decision was limited to the narrow case thus presented and expressly distinguished from "any broad or blind fishing expedition among documents possessed by the government on the chance that something impeaching might turn up," (see 344 U. S. at 418-419) which is the case here.

The defendant had a fair and impartial trial before an able and experienced trial judge. He was shown to be not only a member but also the chairman for the North and South Carolina District of the Communist Party, an organization shown to be an organization advocating the overthrow of the Government of the United States by force and violence, and held to be the basis of the criminal conspiracy charged in the Dennis, Frankfeld, Flynn, Mesarosh and Schneiderman cases, referred to above. Uncontradicted testimony as to statements by him showed that he was thoroughly aware of the unlawful aims and purposes of the party, was in sympathy with those aims and purposes and entered into its activities with complete understanding of what was involved. On the evidence before it, the jury was amply justified in finding him guilty of the crime charged; and we find nothing in the record which would justify us in awarding a new trial.

Affirmed.

APPENDIX B

1. Constitution of the United States

(a) Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(b) Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Statutes

(a) 18 U. S. C. Section 2385 (the Smith Act)

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

(b) 50 U. S. C. Section 783 (the Internal Security Act of 1950) —

(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

* * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

(c) 50 U. S. C. Sections 841 and 843 (the Communist Control Act of 1954)

Section 841. The Congress finds and declares that the Communist Party of the United States, although

purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchial chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the

United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

Section 843. (a) Whoever knowingly and willfully become or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

(d) 28 U. S. C. Section 1861 (Qualifications of jurors)

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.

(e) 28 U. S. C. Section 1864 (Manner of drawing names of grand and petit jurors)

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

* * *

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

* * *

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OCTOBER TERM, 1956

No. 293

JUNIUS IRVING SCALES,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

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OCTOBER TERM, 1956

JUNIUS IRVING SCALES,
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UNITED STATES OF AMERICA.

No. 29

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (R. 116-33) is reported at 227 F. 2d 581.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1955, and a petition for rehearing was denied on November 17, 1955. By order of Chief Justice Warren, the time for filing a petition for certiorari was extended to January 6, 1956, and by subsequent order of Mr. Justice Clark the time for such filing was extended to and including January 16, 1956. The petition was granted on March 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Court of Appeals for the Fourth Circuit affirmed a judgment of the District Court of the United States for the Middle District of North Carolina, entered upon a jury verdict under an indictment, finding the petitioner guilty under the so-called "membership clause" of the Smith Act (Act of June 28, 1940, 18 U. S. C. 2385), proscribing membership in any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of the Government of the United States by force or violence, with knowledge that the purposes of the group of persons are such. It is not disputed that the petitioner was a member of the Communist Party during the three-year period prior to the indictment. The questions are:

1. Whether the "membership clause" of the Smith Act is unconstitutional on its face, or as applied to the facts of this case;

2. Whether the indictment charges an offense under the laws of the United States, in view of Section 4(f) of the Internal Security Act of 1950 (50 U. S. C. 783(f), which provides that neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of that or any other criminal statute;

3. Whether the evidence was sufficient to support the judgment of conviction under the Smith Act; and

4. Whether petitioner was denied a fair trial by virtue of (a) the method of empanelling the Grand Jury, (b) the admission of evidence offered by the prosecution, over the defendant's objection that the evidence was incompetent, irrelevant and inflammatory, (c) the denial of petitioner's request to examine written statements furnished to the Federal Bureau of Investi-

gation by prosecution witnesses, or (d) the "Congressional findings" about the Communist Party in the Internal Security Act of 1950 (50 U. S. C. 781) and the Communist Control Act of 1954 (50 U. S. C. 841).

STATUTES INVOLVED

The relevant provisions of the Constitution of the United States, the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954, and the federal statutes governing the qualifications and empanelling of jurors (28 U. S. C. 1861 and 1864) are set forth in the Appendix, *infra*, pp. 47-52.

STATEMENT

The petitioner has not been accused or convicted of helping to organize the Communist Party, of participating in its activities, or of advocating the overthrow of the United States Government by force or violence. He has not been accused or convicted of conspiring for such purposes, or of participating in a conspiracy of any kind. He has not been accused or convicted of any *act* whatever, other than being (or, more accurately, not ceasing to be) a member of the Communist Party.

The indictment (R. 1-2),[1] returned on November 18, 1954, charges that the Communist Party is and has since January 1946 been a group of persons who advocate overthrowing the United States Government by force and violence; that Junius Irving Scales is and has since January 1946 been a member of the Communist Party; that Scales knew the Party to be a group of persons who advocate violent overthrow; and that Scales intended "to bring about

[1]References to the pages of the printed transcript of record are cited herein as "R.", and to unprinted portions of the original trial record as "Tr."

such overthrow by force and violence as speedily as circumstances would permit."

The trial opened April 11 and ended April 22, 1955. It was conceded by the prosecution (and the trial judge so charged, R. 108) that Scales' criminal act had to be committed between November 18, 1951 and November 18, 1954, the three-year limitations period preceding the indictment. It was acknowledged by Scales (and the trial judge so informed the jury, R. 111) that he was a member of the Communist Party within the statutory period.[2]

The prosecution called three witnesses. The first was Lautner, a paid consultant for the Department of Justice and formerly a Communist. He had never met or had any contact with Scales, and had left the Communist Party in 1950, nearly two years before the limitations period. His testimony (R. 12-31) was limited to the identification of various publications used in Communist circles and to the expression of his opinion, based on these documents and his personal experience while a Communist, that the Party advocated the destruction of the Government by force and violence (R. 24-31).

The second witness, Clontz, by pre-arrangement with the Federal Bureau of Investigation, made contact with Scales in North Carolina in 1948 and joined the Communist Party there in 1950 (R. 31-32 and 43). He went to New York City in March 1951, and all but one item[3] of his testimony relates to occurrences prior to the statutory period. His conversations with Scales before joining the Party are heavily relied on by the Government, to show Scales' knowledge of the Party's aims (R. 35-43). The court below, in

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[2]Petitioner is publicly known as Chairman of the Communist Party in North Carolina.

[3]Clontz testified to a communication with Scales in December of 1951 (R. 56).

ruling that there was sufficient evidence to support the conclusion that Scales knew that the Party advocated violent overthrow, relied principally[4] (apart from Scales' membership and official position in the Party) on two conversations between Scales and Clontz in 1948 and early 1950, over four years before the indictment was brought.

The third Government witness, Childs, likewise joined the Party as an observer for the Federal Bureau of Investigation. He testified extensively concerning his conversations with Scales and his attendance at a Party "school" in 1952 (R. 65-96). But he did not testify that Scales intended to overthrow the Government by force, that Scales knew the aims of the Party to be such, or that in fact they were such.

The petitioner did not testify. For the defense, six witnesses were called, including three character witnesses.[5] Scales' mother testified to conversations in which he had denied any belief or knowledge that the Party advocates violent overthrow (R. 100-04). A member of the faculty of Wesleyan University[6] testified on the nature of Marxism and Leninism, and expressed the opinion that, since 1935, the Communist Party has recognized the possibility of achieving majority political power by means of elections (R. 97-100). *Cf. United States* v. *Mesarosh*, 223 F. 2d 449, 459-66 (dissenting opinion of Judges Hastie and Maris).

The jury found Scales guilty, and the Trial Court sentenced him to be imprisoned for a term of six years (R.

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[4]R. 127-30.

[5]These comprised two members of the faculty of the University of North Carolina, and a clergyman from Chapel Hill. A fourth witness, Professor Douglas Maggs of the Duke University Law School, at which Clontz studied, contradicted Clontz' testimony concerning an alleged conversation between them with respect to Scales' legal defense (Tr. 1361-74).

[6]Professor Robert S. Cohen, a teacher of physics and philosophy, who gives courses entitled "Philosophy of American Democracy" and "Philosophy of Marxism".

116).[7] Thereafter, Scales appealed to the Court of Appeals for the Fourth Circuit, on the same general grounds that are the basis of this petition.

The Court of Appeals sustained the constitutionality of the "membership clause" of the Smith Act[8] on the ground that the clause "is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence"[9] (R. 123). This conclusion is the more remarkable in that the statutory provision in question makes no reference to conspiracy, and this is equally true of the indictment under which Scales was tried (R. 1-2). No co-conspirators are mentioned in the indictment, nor is any overt act in furtherance of conspiracy charged.[10]

The court below also rejected Scales' contention that his prosecution under the "membership clause" of the Smith Act is barred by Section 4(f) of the Internal Security Act of 1950, which provides that neither membership nor office-

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[7]Inasmuch as the maximum penalty for a conviction of conspiracy to violate the Smith Act was five years, Scales' sentence was greater than has been imposed on any one else under the Smith Act. After the sentencing, Scales was held without bail, which had been fixed at $100,000 at the time of his arrest and subsequently reduced to $35,000 in cash (Tr. 1573-79). The order denying bail pending appeal was affirmed by a judge of the Court of Appeals for the Fourth Circuit, but on May 12, 1955, Chief Justice Warren reinstated the previous bail.

[8]The Court of Appeals for the Fourth Circuit had already, by way of dictum, sustained the constitutionality of the "membership clause" in *Frankfeld* v. *United States*, 198 F. 2d 679, at 684 and 690. That case involved an indictment under the conspiracy statute and the other provisions of the Smith Act relating to organization and advocacy.

[9]In fact, the Smith Act does not cover conspiracy to overthrow the Government (which is prohibited by an old statute dating from the War Between the States, now 18 U. S. C. 2384), but rather, advocacy, organization of groups, and distribution of literature with the object of overthrowing the Government.

[10]On petition for rehearing, Scales pointed out that, under the theory of the Court of Appeals, he had been convicted of a crime for which he had been neither indicted nor tried.

holding in the Communist Party shall constitute "per se" a violation of that section "or of any other criminal statute". Totally ignoring the logic and legislative history that require the application of Section 4(f) to just such a proceeding as the present one, the Court of Appeals undertook to distinguish "mere membership" from "membership with knowledge" (R. 126). Under this decision, the application of Section 4(f) would be restricted to Communist Party members who can prove that they do *not* know the Party as a group that advocates violent overthrow. Since such membership is outside any criminal statutory proscription, Section 4(f) is thus rendered meaningless surplusage.

The Court of Appeals found no merit in Scales' other contentions, based upon the insufficiency of the evidence and errors committed in the course of his indictment and trial. It affirmed the judgment of conviction on November 7, 1955, and a petition for rehearing was denied without further opinion ten days later (R. 134). This Court granted certiorari on March 26, 1956.

SUMMARY OF ARGUMENT

I. *The Membership Clause of the Smith Act is Unconstitutional under the First and Fifth Amendments to the Constitution.* In *Dennis* v. *United States*, 341 U. S. 494, this Court construed other provisions of the Smith Act as requiring proof of specific intent to overthrow the Government by force and violence, and set forth several elements of proof, including such specific intent, that are essential to the constitutionally valid application of the Act. The clause of the Smith Act now before the Court does not in terms require proof of intent, and is not reasonably susceptible to such a construction. The conspiracy charged in the *Dennis* case was there held (at p. 511) to be the source of such danger to the Government as to escape the bar of the First

Amendment. In the instant case no conspiracy was charged or proved. Neither are the other constitutionally essential elements specified in the *Dennis* case (at p. 516) present here, for defendant was not charged with any Communist Party "activities" whatsoever, or with having any individual "power to bring about the evil" of violent overthrow, or with intending to use language calculated to incite other persons to such action.

Both on its face and as applied in this case, the membership clause is wholly insufficient to satisfy the "clear and present danger" test as restated in the *Dennis* case, and is therefore unconstitutional under the First Amendment. See also *Herndon* v. *Lowry*, 301 U. S. 242, 261; *Whitney* v. *California*, 247 U. S. 357, 379; *DeJonge* v. *Oregon*, 299 U. S. 353, 362-66. Furthermore, the attempt to attach criminal consequences to non-conspiratorial "membership", unaccompanied by any acts or declarations whatsoever, imputes to the defendant the assumed guilt of others, and violates the due process clause of the Fifth Amendment. *Cf. Whitney* v. *California*, 274 U. S. 357, 372-73.

II. *The Indictment Fails to State an Offense under the Laws of the United States.* Prosecution of Communist Party members under the membership clause of the Smith Act is barred by Section 4(f) of the Internal Security Act of 1950, which provides that neither office-holding nor membership in any Communist organization "shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." This provision was inserted in order to prevent the registration provisions of the Internal Security Act from being rendered invalid or nugatory by the Fifth Amendment's guarantee against compulsory self-incrimination. The legislative history of Section 4(f) makes it plain that Congress specifically intended to protect Communist Party members and

officers against prosecution under the very clause of the Smith Act involved in this case.

The Government's attempted distinction (based on the expression "per se") between "mere membership" and "membership with knowledge" is untenable. Membership in the Communist Party, without knowledge that the Party espouses violent overthrow, is not punishable under the Smith Act or any other federal statute. Therefore the Government's position makes meaningless surplusage of the phrase "or of any other criminal statute" in Section 4(f). Furthermore, the Government's argument leads to grotesque consequences under the Internal Security Act. If Section 4(f) protects against prosecution only Communists who do *not* know of any violent Party purposes, it would follow that any Communist having such knowledge could avoid compliance with the registration provisions under the privilege against self-incrimination. Whatever may ultimately be held to be the legal effect of Section 4(f), its purpose would be entirely frustrated if construed so narrowly as the Government suggests.

III. *The Evidence is Insufficient to Support Petitioner's Conviction under the Smith Act.* The statute under which Scales was convicted requires proof of nothing more than membership in the Party and knowledge of its unlawful purposes. Under the constitutional standards enunciated in the *Dennis* case, such proof is insufficient to support a conviction under the Smith Act. Even if the membership clause were to be construed as requiring the same elements and quantum of proof as were specified in the *Dennis* case, the evidence presented against Scales is so stale and flimsy as to be plainly insufficient for either constitutional or statutory purposes. The Government's principal witness on the teachings and objectives of the Communist Party ceased to be a member more than two years before the period covered

by the indictment, and testified to nothing in the Party program that would constitute a "clear and present danger" in the sense of the *Dennis* case. *Cf.* the dissenting opinion in *United States* v. *Mesarosh*, 223 F. 2d 449, 460-61 (C. A. 3), pending here as No. 20, October Term, 1956. Such scraps of evidence as were presented to establish Scales' guilty knowledge and intent are inherently incredible and considerably antedate the period of limitations.

IV. *The Petitioner was Denied a Fair Trial.* (A) The grand jury was illegally impanelled. It was never determined whether or not the jury box contained the names of 300 qualified persons, as the statute (28 U. S. C. 1864) requires. *United States* v. *Silverman*, 129 F. Supp. 496. The court clerks and the jury commissioner illegally delegated their duty to select qualified jurors fairly representative of the community. *Glasser* v. *United States*, 315 U. S. 60; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; see *Ballard* v. *United States*, 329 U. S. 187, 195. (B) Prejudicial error was committed in the admission of evidence against Scales. The trial court received much evidence concerning Communist teachings unrelated to the issue of force and violence, and which were of such a nature—*e.g.*, the Party's attitude toward the Negro and his status in the South, and toward the war in Korea—as to inflame the jury against Scales. Prosecution witnesses were permitted to describe remote and irrelevant episodes which were extremely prejudicial. (C) The trial court refused to grant Scales' request, under Rule 17 (c) of the Federal Rules of Criminal Procedure, to examine written statements previously furnished to the Federal Bureau of Investigation by the two prosecution witnesses who testified to having known Scales as a Communist. This was erroneous and plainly prejudicial. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214; *Fryer* v.

United States, 207 F. 2d 134. (D) The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal Security Act of 1950 (50 U. S. C. 781) deprived Scales of the opportunity for a fair and impartial trial on the issue of the Communist Party's violent or non-violent aims. In the face of the Congressional "findings" that the Party contemplates resort to force and violence, no jury could determine this question on the basis of an independent and objective scrutiny of the evidence offered in this case. *Cf. Delaney* v. *United States*, 199 F. 2d 107, 112.

ARGUMENT

This case is the first prosecution under the membership clause of the Smith Act to reach this Court. Another case under that clause is also here on certiorari,[11] and several others are pending in various federal district courts.[12]

The defendants in the *Dennis* case were indicted under the membership clause of the Smith Act,[13] as well as for the conspiracy of which they were convicted. None of them has been tried under the membership indictments, but these have not been dismissed,[14] despite the lapse of eight years. Following the *Dennis* case, there has been a series of Smith Act conspiracy prosecutions, of which two are presently

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[11] *United States* v. *Lightfoot*, 228 F. 2d 261 (C. A. 7), pending here as No. 32, October Term, 1956.

[12] *United States* v. *Blumberg* (E. D. Pa.); *United States* v. *Noto* (W. D. N. Y.); *United States* v. *Weiss* (N. D. Ill.); *United States* v. *Russo* (D. Mass.); *United States* v. *Blum* (S. D. Ind.); *United States* v. *Hellman* (D. Mont.). In addition, there are membership indictments still pending against the defendants in the *Dennis* case. *United States* v. *Dennis*, No. C 128/89 (S. D. N. Y.), and other indictments against Winter, Gates, Davis, Hall, Thompson, Foster, and Stachel.

[13] See *United States* v. *Foster*, 80 F. Supp. 479 (S. D. N. Y. 1948).

[14] See footnotes 12, *supra*, and 17 and 18, *infra*.

here on certiorari.[15] The instant case is one of a handful of individual prosecutions under the membership clause of the Smith Act, instituted by the Government since 1953.[16] It is not for petitioner to state why the Government has invoked the membership clause in these recent cases.[17] However, it is apparent that, if its constitutionality were to be upheld, the membership clause offers the Government much better prospects than do the other provisions of the Smith Act for repeated prosecutions of the same individual.[18]

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[15] *Yates* v. *United States*, Nos. 6, 7 and 8, and *Mesarosh* v. *United States*, No. 20, October Term, 1956. See also *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4, 1952), *cert. denied* 344 U. S. 922; *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2, 1954), *cert. denied* 348 U. S. 909; *Wellman* v. *United States*, 227 F. 2d 757 (C. A. 6, 1955), petition for certiorari pending, No. 9 Misc. October Term, 1956. There are pending and undetermined in the courts of appeal other Smith Act conspiracy convictions from trials held in Philadelphia, Denver, Seattle, and the Hawaiian Islands. See, respectively, *United States* v. *Kuzma*, Nos. 11,655-663 (C. A. 3); *Bary* v. *United States*, Nos. 5240-46 (C. A. 10); *Huff* v. *United States*, (C. A. 9); *Fujimoto* v. *United States*, No. 13915 (C. A. 9). Still other conspiracy trials have been concluded or are pending in the federal district courts in Cleveland, New York City, St. Louis, New Haven, Boston, and Porto Rico.

[16] See footnote 12, *supra*.

[17] Had the Government proceeded with the trial of the *Dennis* defendants under their membership indictments following their release from prison upon completion of the sentences imposed on them in the *Dennis* case, there would have been the aroma if not indeed the actuality of double jeopardy. Conceivably this circumstance dissuaded the Government from exposing the membership clause to its initial constitutional challenge on the basis of these old indictments, and suggested that it might be tested under less distasteful circumstances in a fresh case against a Party member not previously indicted for conspiracy.

[18] In the case of a member of the Communist Party or other organization who has once been convicted of conspiracy to violate the Smith Act, it might well be difficult for the Government to establish by sufficient proof a conspiracy subsequent to the first indictment, even if the individual openly re-associated with the Party upon being set at liberty. But under the membership clause neither conspiracy nor any act need be charged, and a second prosecution of an avowed member would thereby be greatly facilitated.

I. THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS UNCONSTITUTIONAL UNDER THE FIRST AND FIFTH AMENDMENTS

The petitioner is aware that this Court does not decide constitutional questions unless the posture of the other issues raised in a particular case requires that the constitutional question be confronted. *Peters* v. *Hobby*, 349 U. S. 331; *United States* v. *Rumely*, 345 U. S. 41. In the present case, there are important non-constitutional issues the disposition of which, it is believed, will in any event require reversal of the decision below. But the constitutional and non-constitutional problems overlap considerably, and the case as a whole can perhaps be most clearly and helpfully presented by starting with the historical background and legal characteristics of the membership clause and the constitutional questions which it raises.

A. Historical Background of the Membership Clause

"Guilt is personal", but to say this is to state the problem, not to answer it. The law has long grappled with the question of what degree of association with a crime is sufficient to establish that the individual so associated may fairly be charged with guilt. Out of this enduring problem have developed the legal principles relating to principals and accessories, felony murders, attempts, and conspiracies.

This case involves the associative concept of "membership", familiar in the field of corporations, trade unions, and other aspects of civil law and litigation. But as a criminal concept it is unknown to the common law, and only rarely and in times of great political or economic stress have legislatures undertaken to attach criminal consequences to membership in a group, without reference to some act or concert for purposes of action, such as conspiracy, upon which criminal liability has always depended. Thus in 1799, when Britain was wracked by the Napoleonic wars as well as

by the reform movement and other political crises, Parliament enacted the Unlawful Societies Act,[19] which condemned certain societies by name,[20] as dangerous to "the existence of regular government", and provided that "every person who . . . shall become a member of any such society . . . shall be deemed guilty of an unlawful combination and confederacy."

Another British statute containing a similar provision, enacted in 1817, was directed against societies bound by oaths of secrecy.[21] Apparently prosecutions under these enactments were very infrequent, although as late as 1834 they were invoked against societies of workingmen such as those from which the trade unions were developing.[22] At all events when, a century later, the para-military activities of Sir Oswald Moseley's uniformed adherents assumed proportions thought to be dangerous, Parliament's remedial

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[19]39 Geo. 3 c. 79. This statute had been preceded in 1797 by the Unlawful Oaths Act, 37 Geo. 3 c. 123, which proscribed the formation of societies bound by oaths of secrecy.

[20]The preamble to The Unlawful Societies Act embodies a Parliamentary "finding", not unlike the Congressional findings in the Communist Control Act (50 U. S. C. 841) and the Internal Security Act (50 U. S. C. 781), of the existence of "a traitorous conspiracy . . . in conjunction with the persons from time to time exercising the powers of government in France, to overturn the laws, constitution and government . . . both in Great Britain and Ireland, and to dissolve the connection between the two kingdoms", and of "divers societies of a new and dangerous nature, inconsistent with publick tranquillity and with the existence of regular government, particularly certain societies calling themselves Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen, and the London Corresponding Society . . ." which it was the purpose of the Act to suppress.

[21]The Seditious Meetings Act, 57 Geo. 3 c. 19.

[22]*Rex* v. *Lovelass*, 6 Carr. & Payne 596; *Rex* v. *Dixon*, 6 Carr. & Payne 601 (involving the Cordwainer's Union of Cambridge). Both are *nisi prius* decisions, the first under The Unlawful Oaths Act of 1797 and the latter under The Seditious Meetings Act of 1817. No reported cases under The Unlawful Societies Act of 1799 have been found.

legislation did not undertake to punish membership in the Moseley organization.[23]

In the United States, "membership" as the basis for penal sanctions first assumed importance with the enactment, early in this century, of numerous state statutes punishing "criminal anarchy" and "criminal syndicalism". The New York statute of 1909,[24] sustained by this Court in *Gitlow* v. *New York*, 268 U. S. 652, contains a provision (not involved in the *Gitlow* case) punishing any person who "organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group, or assembly of persons formed to advocate" criminal anarchy. The criminal syndicalism and related state statutes passed immediately following the First World War also commonly contained clauses specifically directed against being or becoming a member of any group or organization espousing the teachings against which the statutes were directed.[25]

The California criminal syndicalism statute[26] came before this Court in *Burns* v. *United States*, 274 U. S. 328 (1927) and *Whitney* v. *California*, 274 U. S. 357 (1927), and the Kansas statute in *Fiske* v. *Kansas*, 274 U. S. 380

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[23]The Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6 c. 6, prohibits quasi-military organizations that organize and train to use force for the achievement of political ends. It is made a criminal offense to take part in the control or management of any such organization, or in the training of its members, but the accused is allowed to show as a defense that "he neither consented to nor connived at the organization . . . in contravention of the provisions of this section."

[24]Laws 1909, c. 88, now sections 160-66 of the Penal Law.

[25]See, *e.g.*, the statutes involved in *People* v. *Steelik*, 187 Cal. 361, 203 Pac. 78 (1921); *State* v. *Dingman*, 37 Ida. 253, 219 Pac. 760 (1923); *People* v. *Lloyd*, 304 Ill. 23, 136 N. E. 505 (1922); *State* v. *Tonn*, 195 Ia. 94, 191 N. W. 530 (1923); *State* v. *Berquist*, 109 Kan. 368, 199 Pac. 101 (1921); *State* v. *Laundy*, 103 Ore. 443, 204 Pac. 958 (1922); *Commonwealth* v. *Blankenstein*, 81 Pa. Sup. Ct. 340 (1923); *State* v. *Hennessey*, 114 Wash. 351, 195 Pac. 211 (1921). In a few of these decisions the membership clause, as distinguished from the more orthodox provisions, was considered and upheld. *State* v. *Hennessey*, *supra*; *State* v. *Laundy*, *supra*. In others its validity was doubted. *People* v. *Lloyd*, *supra*; *State* v. *Tonn*, *supra*.

[26]California Statutes 1919, c. 188, Deering's Penal Code (1949), pp. 773-74.

(1927). As applied to the facts of each case, the California law was held constitutional and the Kansas law unconstitutional. None of the three decisions is governing here, because (although both laws punish membership in an organization advocating criminal syndicalism) none of the defendants was indicted for membership alone, but also for organizing the group in question.[27] In the *Whitney* case, however, Justice Brandeis (in whose opinion[28] Justice Holmes concurred) noted the extraordinary reach of the California statute's membership clause, questioned its constitutional validity, and concurred in the Court's decision only because the defendant had not raised the "clear and present danger" question in the state court, and because there was evidence linking the defendant not only with syndicalist doctrine but also with "a conspiracy . . . to commit present serious crimes."[29]

The similarity between the Smith Act and the New York criminal anarchy statute was noted in the *Dennis* case,[30] and it may reasonably be assumed[31] that the inclusion of the membership clause in the Smith Act is due to the presence of comparable clauses in the state statutes that antedated it by twenty to thirty years. However, there is one significant respect in which the Smith Act clause differs from its New York state predecessor, for the former alone requires knowledge of the Party's unlawful purposes as an element of the offense[32]—a provision added by a Senate

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[27]In both the *Fiske* and *Burns* cases the group was the Industrial Workers of the World; in the *Whitney* case it was the Communist Labor Party of California.

[28]See *Whitney* v. *California, supra,* at pp. 372-80.

[29]*Id.*, at 379-80. See also the *Dennis* case at pp. 513-14.

[30]See the *Dennis* case at pp. 536 and 562, n. 2.

[31]The legislative history of the Smith Act is silent on the source of the membership clause.

[32]In this respect the Smith Act membership clause resembles the California criminal syndicalism law, which specifies "knowingly" as an element of criminal membership, and differs from the Iowa, Washington, and Oregon statutes, which do not. See the *Laundy* and *Hennessey* cases, *supra,* note 25.

amendment to the original bill, which did not require such knowledge.[33]

The Smith Act membership clause does not, however, specify personal intent, to overthrow the government by force and violence, as an element of the offense. Since Congress expressly included the requirement of such intent in the adjacent paragraph of the Smith Act relating to the publication and distribution of subversive printed matter,[34] and since Congress carefully added by amendment the requirement of knowledge but not of intent to the membership clause, it would appear that intent should not be read by implication into that clause.[35]

B. Constitutional Limits on the Scope of the Smith Act.

The Smith Act is a law which proscribes advocacy of overthrowing the Government by force or violence whether by personal exhortation, by printing and disseminating literature, or by organizing or joining groups engaging in such advocacy. In the *Dennis* case, this Court upheld the constitutionality of the advocating and organizing provisions, subject to specific limitations laid down in the Court's opinion as necessary to sustain the constitutionality of the Act under the First Amendment.

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[33]H. R. 5138 (76th Cong., 1st sess.). This bill, introduced by Representative Howard Smith of Virginia, was passed by the House on July 29, 1939 (84th Cong. Rec. 10451-56). It was redrawn in the Senate Committee on the Judiciary, and as amended (with the requirement of knowledge added to the membership clause) it passed the Senate on June 15, 1940 (86 Cong. Rec. 8340-47). The bill was enacted into law as amended.

[34]See the complete statute in the Appendix, *infra*, pp. 47-48.

[35]The "distribution" paragraph of the Smith Act expressly requires an intent to overthrow the Government. The "advocacy" and "organization" paragraphs do not, but in the *Dennis* case it was held (at pp. 499-500) that the inherent nature of advocating or organizing for the violent overthrow of government is such as to require "the inclusion of intent as an element of the crime". Clearly this is not true of membership, which may be of an entirely passive nature, involving no other overt action from which intent might reasonably be inferred.

All of the opinions in the *Dennis* case, including Judge Learned Hand's opinion below[36], are pregnant with awareness that the case presented a problem quite different from what was involved in the *Schenck*, *Gitlow*, and other free speech cases of the post-World War I years. On the one hand imminent (i. e. "present") peril of violent overthrow of the government (the "substantive evil") was, on the record in the *Dennis case*, totally unproved. On the other hand the potential ultimate (i. e. "clear") danger of such overthrow was inferred from the Communist Party's doctrine, leadership, organization, and activities both in the United States and abroad.

The clear and present danger in the *Dennis* case was not the conspiratorial activities, standing alone, of the handful of defendants. Nor was it the Communist Party itself, which was not even under indictment. The danger in the *Dennis* case was the conspiracy of the defendants to advocate and bring about violent overthrow of our Government through and by means of the Communist Party. It was the defendant's concerted and violent objectives, *coupled with* the potent instrumentality utilized for their achievement, that was the basis of Judge Medina's finding (approved by both the Court of Appeals and this Court)[37] that "there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution."

In Smith Act conspiracy prosecutions, therefore, the impact of the "clear and present danger" rule is to require a *nexus* between the conspirators' violent intent and an instrumentality proportioned to the magnitude of the objective. Conspiracies to obstruct the draft or impede war production may achieve their purpose, at least in part, with relatively modest means. But overthrowing the United

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[36] *United States* v. *Dennis*, 183 F. 2d 201.

[37] See 183 F. 2d at 215-216 and 341 U. S. at 511-515.

States Government is no job for boys. Unless conspirators to this end have laid hold of some engine or organization powerful enough to give cause for alarm under Judge Learned Hand's restatement of Justice Holmes' rule,[38] their conspiracy to advocate force and violence is not constitutionally punishable under the Smith Act.

In the *Dennis* case, the Communist Party was found to be such an organization. Under familiar principles, however, that finding was conclusive only for that case. In each Communist trial under the Smith Act, there must be proof that the Party possesses the dangerous and unlawful attributes that are required under the "clear and present danger" test.

In the free speech cases under the Espionage Act it was quite clear that the defendants were directly and personally responsible for whatever degree of danger had been caused. For example, when Eugene V. Debs made a speech praising those who violated the military draft laws, the danger of the "substantive evil" was directly traceable to Debs, and the only question was whether it was "clear and present" enough. Since even a single speech might "bring about the substantive evil" of obstructing military service, Debs' conviction was upheld. *Debs* v. *United States*, 249 U. S. 211 (1919).

But if Debs (or Schenck or Gitlow) had made a speech advocating that the Government be overthrown by force, under the *Dennis* case there would have been no constitutionally punishable offense, because (in Chief Justice Vinson's phrase)[39] there would have been no "power to bring about the evil" of violent overthrow.[40] Indeed, it is hard to see

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[38]See 341 U. S. at 510 and 183 F. 2d at 212.

[39]341 U. S. at 516.

[40]See also Justice Frankfurter's concurring opinion in the *Dennis* case at p. 542. "Our decision today certainly does not mean that the Smith Act can constitutionally be applied to facts like those in *Gitlow* v. *New York*".

how (short of war) this particular "substantive evil" can become a "clear and present danger" unless by an organization, such as the Communist Party, of such ideological and numerical dimensions that it merits description as a "movement".

Thus the Smith Act Communist prosecutions are the exact converse of the *Debs* case. There the personal responsibility is plain, but the limited power of evil is sufficient to create a danger only if the objective is a relatively narrow one. In the Smith Act cases the Communist Party (if there is judicially satisfactory proof) supplies the power to create the danger of violent overthrow, and the question of personal responsibility at once emerges as the crucial issue.

This Court's opinion in the *Dennis* case manifests its full awareness of the thorny questions of personal guilt or innocence laid open by its decision bringing the Communist Party within the possible scope of the "clear and present danger" rule. The possibilities of non-criminal affiliation with such an organization—embodying a century-old dialectic and dogma, world-wide in aspiration and activity, and espousing a variety of viewpoints appealing even to many who are repelled by the monolithic and despotic features of Communism—are extensive and well-known to be so.

It is in the light of these considerations that the factors specified in the *Dennis* case, as constitutionally necessary elements of guilt under the Smith Act, must be viewed. These elements are not haphazard; on the contrary, they sharply reflect the real problems of national security, personal liberty, and individual responsibility that necessarily attach to prosecutions of Communists under our constitutional system. There are three specific requirements stated in the *Dennis* case which are especially pertinent to the constitutionality of the membership clause.

(1) *Conspiratorial Power.* In view of the immensity of the "substantive evil" against which the Smith Act is

directed, it is absurd to think of a "clear and present danger" caused by an individual. Governments are not overthrown by individuals, but by conspiracies, juntas, and movements. "It is the existence of the conspiracy which creates the danger", as Chief Justice Vinson wrote in the *Dennis* case (at p. 511), while Justice Jackson observed (at p. 577): "There is no constitutional right to 'gang up' on the Government." It is the conjunction of the conspiracy to destroy the government with the strong instrumentality of the Communist Party (assuming that the Party's similar purpose has been established) that constitutes the clear and present danger, as all of the majority opinions in the *Dennis* case make clear.[41] To support a Smith Act conviction of Communists, therefore, the accused must be shown to have been so connected with the Party that they could exploit its power to bring about the "substantive evil" of violent overthrow. Guilty activity in and through the Party must, as was ruled in the *Dennis* case (at p. 516), be such as to establish not only the defendants' evil intent but also that "the nature of their activities" and "their power to bring about the evil" are so great as to justify a determination that their conspiracy created a "clear and present danger" to national security.

(2) *Incitement.* The substantive offense punished by the Smith Act is not discussion, but advocacy of action. In the *Dennis* case, this Court showed great concern that the Act be not construed to penalize the exposition and analysis of ideas, however unpopular,[42] and Justice Frankfurter noted that:[43] "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." At the trial, Judge Medina instructed the jury to determine whether the defendants

[41] See 341 U. S. at pp. 498, 511, 546-48, 564-66.
[42] *Id.* at 501-02, 544-46, and 572.
[43] *Id.*, at 545.

conspired to advocate violent overthrow "by language reasonably and ordinarily calculated to incite persons to such action." That instruction was subsequently approved by this Court as specifying one of the essential elements of the crime.[44]

(3) *Personal Intent to Overthrow the Government.* This was likewise specified in the *Dennis* case (at pp. 499-500 and 516) as a constitutional element of Smith Act guilt. Furthermore, the intent is insufficient if it relates to the indefinite future; under the *Dennis* case (at pp. 511-12) it must be an intent to overthrow the government "as speedily as circumstances would permit."

It is perhaps only theoretically possible that an individual Communist might intend to overthrow the Government but remain ignorant of the Party's program. But it is both theoretically possible and practically certain that one—indeed many—who know the Party program may lack the specific intent. The undercover agent who joins the Party to report its personnel and activities to the Government presumably knows the Party's illegal purposes, but surely lacks intent. The individual who joins the Party because he believes it to be an effective avenue for the achievement of some socio-economic goal such as unionization or the abolition of racial restrictions, may be entirely lacking in violent or unlawful intent of any kind, whether or not he knows of the Party leadership's subversive purposes. Examples could readily be multiplied.

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[44] *Id.*, at pp. 511-13. See also the dissenting opinion of Justice Reed (concurred in by Justices Burton and Minton) in *Pennsylvania v. Nelson*, 350 U. S. 497, 516: "We look upon the Smith Act as a provision for controlling incitements to overthrow by force and violence the Nation, or any State, or any political subdivision of either."

C. Constitutional Deficiency of the Membership Clause under the First and Fifth Amendments

For all that appears from the indictment under which Scales was convicted, he never met another member of the Communist Party, much less discussed or plotted the violent overthrow of our Government with any other members. There is no charge that he ever heard anyone advocate the overthrow of government, much less that he himself ever engaged in such advocacy. There is no charge that he ever engaged in any Party activity.

No concert of action or intention with any other person is charged against Scales. Indeed, no act of any kind whatsoever is charged; the accusation is purely one of status (membership) and state of mind. There is no charge that Scales, alone or in collaboration with any one else, ever planned or contemplated that violent overthrow would be advocated by anyone; *a fortiori* the indictment does not charge that such advocacy would be in language calculated to incite other persons to unlawful action.

In short, the indictment charges nothing more than a state of mind comprising knowledge and intent,[45] manifested in the external world by nothing more than non-conspiratorial membership in the Communist Party, unsupported by any charge of Party contacts or activities. It is too plain for argument that such a charge wholly fails to satisfy the requirements stated in the *Dennis* case, and violates the First Amendment to the Constitution.

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[45] As noted *supra*, p. 17, the membership clause does not specify intent as an element of the crime, and of course this defect cannot be cured by adding the allegation to the indictment, as was attempted here. *Thornhill* v. *Alabama*, 310 U. S. 88. But even if intent is read by implication into the membership clause, its constitutionality would not be saved, and the analysis of the constitutional question herein assumes, contrary to Congress' apparent purpose, that intent is a requirement by implication under the membership clause.

In its efforts to defend the constitutional validity of Scales' conviction, the Government finds itself obliged to forget that this is not a conspiracy case. Their brief (in response to the petition for certiorari) specifies (at p. 10) as one of the "crucial elements" in the *Dennis* case the defendants' "active participation in support and furtherance" of the Communist Party and its unlawful objectives, and then blandly asserts that this element "is clearly present here". But if "active participation" is present in Scales' case, it is certainly not in either the indictment or the statute on which the indictment is based. Whatever the purport of the evidence about Scales' Party activities may be,[46] it is wholly irrelevant to the constitutionality of the membership clause and the validity of the indictment. The defendants in the *Dennis* case "actively participated" by conspiring with each other and taking action in furtherance of unlawful purposes. But Scales is charged neither with conspiring nor acting.

The court below leaped at the constitutional hurdle by simply equating the membership clause with conspiracy[47]: "The membership clause of the statute is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes . . . ". But who were Scales' partners? They are not named in the indictment, and it is "elementary" that a conspiracy charge requires more than one conspirator.[48] Scales has not been indicted for conspiracy, and of course his conviction can not be sustained by erroneously assuming that he was. As Justice Brandeis observed in

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[46] *Infra*, pp. 35-37.

[47] See 227 F. 2d at 587, and R. 123.

[48] See *United States* v. *Rabinowich*, 238 U. S. 78, 88 (1915); Ferdinando Pulton, *De Pace Regis et Regni* (London, 1615), pp. 232-33. Under the federal conspiracy statute, overt acts must also be alleged in the indictment.

Whitney v. *California*, 274 U. S. 357, 372-73, statutes such as the membership clause purport to create "a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly."

In weighing the constitutionality of the membership clause, the Fifth Amendment must be considered as well as the First. No more than many others is the phrase "guilt by association" self-defining, but it is not meaningless. Its meaning is not abstruse: a man may be held criminally liable only for his own conduct, or for the conduct of others in some form of concert or combination which is recognized by our law as warranting holding an individual participant responsible for the acts of other participants. "Membership" is not such a recognized combination. Joint participation in a felony is, and so is conspiracy. But courts and legislatures alike have remained awake to the dangers of injustice that surround imputed guilt, and have erected a variety of safeguards against oppressive consequences.

To attach criminal consequences to "membership", unaccompanied by acts or declarations that might bring the charge within the ambit of associative concepts known to our law, would so far extend the notion of imputed guilt as plainly to violate the due process clause of the Fifth Amendment[49] and, in the circumstances of this case, the First Amendment as well. The "dangers to the liberty of the individuals and the integrity of the judicial processes

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[49] John Lord O'Brian, *National Security and Individual Freedom* (1955), at p. 27-28:

"The Smith Act of 1940 *made it unlawful* for any person to be or to become a member of or affiliate with any society, group, or assembly which teaches, advocates, or encourages the overthrow or destruction of any government in the United States by force or violence. These statutes, therefore, imported into our law the alien doctrine of guilt by association, which up to this time had been regarded as abhorrent and which had never been recognized either by the courts or by the Department of Justice, even during the perils and excitements of the First World War."

that are inherent in conspiracy charges" were strongly delineated by the late Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U. S. 440, at 457. But at least the dangers of the conspiracy concept are known to and limited by judicial practice.

In a conspiracy case, the conspirators (two or more) must be identified, and the prosecution must prove an agreement among them "to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy". See *United States* v. *Falcone*, 311 U. S. 205, 210. Assistance and support even to those known to be engaged in crime does not establish conspiracy with them, lacking any agreement to pursue the unlawful ends. *United States* v. *Falcone, supra; Butler* v. *United States*, 197 F. 2d 561 (C. A. 10, 1952). Nor does unlawful intent satisfy the requirements, for:[50]

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself . . ."

But the charge against Scales covers no agreement or plot of any kind. It rests solely on knowledge and intent (assuming that intent is read into the clause).[51] In a conspiracy there must be evidence of affirmative conduct by the defendant in aid of the criminal agreement among the parties—what Justice Rutledge called "informed and interested cooperation, stimulation, instigation." See *Direct Sales Co.* v. *United States*, 319 U. S. 703, 713. As Judge Learned Hand has put it, a conspirator "must in some sense promote . . . [the] venture himself, make it his own, have a

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[50] *Mulcahy* v. *Regina*, L. R. 3 H. of L. 306, 317 (1868).

[51] *Supra*, pp. 17 and 23.

stake in its outcome." *United States* v. *Falcone*, 109 F. 2d 579, 581 (C. C. A. 2, 1940); see also *United States* v. *American Precision Products Corp.*, 115 F. Supp. 823, 826 (D. N. J. 1953). But nothing like this has been charged against Scales.

Flexible as are the required elements of conspiracy, they serve to specify the charge of guilty connection with crime in terms long familiar in the courts. But the charge of "membership" serves no such purpose, and is unknown to legal process as a basis of criminal liability. Justice Brandeis' strictures on the validity of the membership clause in the California criminal syndicalism statute are directly applicable here:[52]

> "The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.
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> ". . . I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a prole-

[52] *Whitney* v. *California*, 274 U. S. 357, 372-73, 379. *Cf.* the line of cases invalidating state statutes such as one which undertook to punish "associating with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers and gamblers . . ." *The City of St. Louis* v. *Roche*, 128 Mo. 541, 31 S. W. 915 (1895); *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628 (1896).

tarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment . . ."

That there are few precedents in the books merely underlines the novel character of the membership clause. When occasion has offered, this Court has not hesitated to strike down statutes under which the degree of connection between the defendant, and the alleged criminal conduct of others, was far less tenuous than it may be under the membership clause. *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; see also *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 402-04.

If the membership clause is now to be weighed in the constitutional scales, all these traditional principles manifestly require that it be held invalid under the First and Fifth Amendments.

II. THE INDICTMENT FAILS TO STATE AN OFFENSE UNDER THE LAWS OF THE UNITED STATES

In any prosecution of a Communist Party member under the membership clause, the question of the effect of Section 4(f) of the Internal Security Act of 1950 is posed *in limine*. For if Section 4(f) is given the effect that logical analysis requires and the legislative history supports, it is a bar to such prosecutions.[23] Accordingly, the indictments in this and similar cases fail to state an offense under the laws of the United States.

Section 4(f) provides that neither Communist membership nor office-holding "shall constitute per se a violation

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[23]Since Section 4(f) applies only to prosecutions of members and officers of "any Communist organization", it does not repeal the membership clause of the Smith Act, which applies to membership in any organization of persons who advocate violent overthrow of the government. Rather, Section 4(f) limits the scope of the clause by excluding the category of persons specified in Section 4(f).

of subsection (a) or subsection (c) of this section or of any other criminal statute". The court below, relying on the phrase "per se", held (227 F. 2d at 589) that Section 4(f) does not apply to Communists "who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government". Such membership is not "mere" (i.e. "per se") but "with knowledge", and this added element removes it from the scope of Section 4(f).[84]

The effect of this construction, obviously, is to limit Section 4(f) to Communists who do *not* have the stipulated knowledge. But this is wholly incompatible with the structure and purpose of the Internal Security Act in general and Section 4(f) in particular.

A. Legislative History of Section 4(f) of the Internal Security Act of 1950

Section 2 of the Internal Security Act (50 U. S. C. 781) embodies a "Congressional finding of necessity" in which "Congress finds" that (paragraphs 6 and 15) the Communist movement in the United States, including Communist organizations that "designate themselves as political parties", is "an organization . . . rigidly and ruthlessly disciplined . . . seeking to advance a moment when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . ." in order to set up a "Communist totalitarian dictatorship" which will be "subservient" to other such dictatorships. There is no doubt, in the light of this finding, that Congress in enacting

[84] The Court of Appeals also relied (227 F. 2d at 589) on Section 17 of the Internal Security Act (50 U. S. C. 796), which provides that: "The foregoing provisions of this subchapter shall be construed as being in addition to and not in modification of existing criminal statutes". On familiar principles of construction, however, this general provision does not override the specific reference in Section 4(f) to "any other criminal statute". *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204.

the Internal Security Act regarded the Communist Party as a group of persons who advocate and encourage the violent overthrow of our Government, such as is described in the Smith Act.

Section 4(a) of the Internal Security Act makes it a crime "knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . under the domination or control of any foreign government . . . organization . . . or . . . individual". Sections 7 and 8 of the Act (50 U. S. C. 786-87) provide for compulsory registration, under severe criminal penalties for failure, of Communist organizations and members. Especially in view of the "Congressional finding" in Section 2, it is obvious that the registration provisions raise serious questions of self-incrimination for Communist members under Section 4(a). It was in order to deal with this problem that subsection (f) was originally added to Section 4, as the legislative history indisputably shows.

In the Eightieth Congress, the precursor bill, known as the Mundt Nixon bill,[55] contained no immunity provision of any kind. In the next Congress, and while a successor bill[56] was under consideration in the Senate Judiciary Committee, the late John W. Davis pointed out, in a letter to the Committee, that the compulsory registration provisions might be unconstitutional as compelling self-incrimination under the section of the same bill making it a crime to conspire to establish a foreign-controlled totalitarian dictatorship in the United States.[57] This letter appears to have instigated the language thereafter inserted in both House and Senate that developed into Section 4(f) of the Act.

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[55]H. R. 5832 (80th Cong., 2nd Sess.). This bill passed the House, but died in the Senate.

[56]S. 2311 (81st Cong., 1st Sess.).

[57]S. Rep. No. 1385, 81st Cong., 2nd Sess., pp. 43-44.

The House bill[58] was reported out with a provision which merely forbade the receipt in evidence of the fact of registration in prosecutions under the Internal Security Act itself. On the floor, Congressman Celler pointed out that this provision was not only deficient under the rule of *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), but also that it furnished no protection against prosecutions under the Smith Act.[59] Shortly thereafter the manager of the bill[60] offered an amendment, adopted *viva voce*, which granted the same protection against prosecutions "for any alleged violation of any other criminal statute."

The Senate bill[61], in the meantime, was reported out with a provision that neither membership nor office-holding in any Communist organization should constitute a violation of the Internal Security Act. In a minority report,[62] Senator Kilgore pointed out this provision "does not even purport to avoid self-incrimination in relation to the membership clause of the Smith Act." The same criticism was made on the Senate floor by Senators Humphrey, Lehman, and Kefauver,[63] but it was not amended in this respect prior to its passage by the Senate. In conference, however, Section 4(f) assumed the form in which it was enacted into law, and it was there that the words "per se" and "or of any other criminal statute" were added to the first sentence,[64] with which we are presently concerned.

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[58]H. R. 9490 (81st Cong., 2nd Sess.), passed by the House on August 29, 1950.

[59]96 Cong. Rec. 13739-13740.

[60]96 Cong. Rec. 13761. The manager was Congressman Wood, who was also then Chairman of the Un-American Activities Committee. His amendment, of course, accomplished nothing in terms of the *Counselman* case, *supra*.

[61]S. 4037 (81st Cong., 2nd Sess.).

[62]S. Rep. 2369, Part 2 (81st Cong., 2nd Sess.).

[63]96 Cong. Rec. 14190, 14479, 15198-99.

[64]H. Rep. No. 3112 (81st Cong., 2nd Sess.); 96 Cong. Rec. 15280.

B. Section 4(f) is a Bar to the Prosecution of Communist Party Members and Officers under the Membership Clause

This conclusion follows inevitably from the logic and legislative history of Section 4(f). Plainly, Congress added the words "or of any other criminal statute" with the membership clause specifically in mind. And the Government (as well as the court below) misses the essential point when it argues, as it does in its brief in response to the petition for certiorari (pp. 13-14), that Section 4(f) was not intended to modify any other statute but only "to insure the enforceability of the registration provisions of the . . . Internal Security Act . . . by making the privilege against self-incrimination unavailable as a defense to failure to register.". For that could only be accomplished by giving Communist registrants immunity from prosecution on the basis of membership.[85] If the words "or of any other criminal statute" do not apply to the Smith Act, they are meaningless surplusage, for there is nothing else for them to accomplish.

The distinction drawn below between "mere membership" and "membership with knowledge"[86] is untenable. Whatever may be held to be the legal effect of Section 4(f), its purpose would be entirely frustrated by confining its scope in accordance with the decision below in this case. For the lower court's construction would exclude from its coverage all Communists who know the objectives of the Communist organization to which they belong, as found by Congress in Section 2 of the Act. It would thus be an inevitable consequence of the decision below that Communists who know the Congressionally-found purposes of their

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[85]Whether or not Section 4(f) successfully accomplishes its intended purpose is another question, not here at issue. *Cf. Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115.

[86]227 F. 2d at 589.

organization are given no immunity under Section 4(f) and could plead the privilege against self-incrimination to avoid compliance with the registration provisions, which thus would be binding only on Communists who do *not* know their organization's purposes.

In short, the construction adopted below turns the entire statute into an absurdity. Plainly, membership "per se" means membership without other criminally significant acts or declarations, not membership without knowledge of the purposes of the group. No other interpretation accords with common sense and the plain purpose of the provision.[67]

Perhaps to say more is to heap Pelion on Ossa. At this risk, it may be added that in 1954 Congress, during the debates on the bill that became the Communist Control Act of 1954 (50 U. S. C. 841-844), again manifested its understanding that Section 4(f) of the Internal Security Act bars the prosecution of Communists for membership with knowledge.[68] To the original bill (S. 3706, 83rd Cong. 2nd Sess.), Senator Humphrey offered an amendment containing a Congressional finding (parallel to that in Section 2 of the Internal Security Act) that the Communist Party aims to overthrow the Government by force and violence, and a

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[67] *Cf. United States* v. *Ginn*, 222 F. 2d 289, at 290-91. It should also be noted that both Sections 4(a) and 4(c) make knowledge an element of the crimes they proscribe, so that if Section 4(f) were construed to cover only membership without knowledge, it would be operative only with respect to persons who would not in any event be liable under Sections 4(a) and 4(c). This applies equally to the membership clause of the Smith Act which punishes membership only if accompanied by knowledge, so that the phrase "of any other criminal statute" would likewise be robbed of all operative effect.

[68] Of course, there is no suggestion here that the Communist Control Act of 1954 amended or repealed the membership clause, as the Government misconstrues the argument in its brief in response to the petition for certiorari (at p. 14). The argument is simply that the legislative history of the Communist Control Act reinforces the conclusion that Section 4(f) of the Internal Security Act limited the application of the membership clause by excluding Communist organizations from its coverage.

criminal proscription of membership in the Communist Party with knowledge of its purposes. 100 Cong. Rec. 14208. This, of course, was substantially the same as the "membership clause" of the Smith Act.[69]

Had the penal provisions of the Humphrey amendment been enacted, they might have operated as a *pro tanto* repeal or modification of Section 4(f) of the Internal Security Act—i.e., they might have reinstated the liability of Communists to prosecution for membership with knowledge under the new legislation *or* under the membership clause of the Smith Act. This, in turn, would have greatly fortified the plea of self-incrimination by Communist Party members under the registration provisions of the Internal Security Act—the very eventuality which it was the purpose of Section 4(f) to avoid. In short, Congress confronted in 1954 the identical problem it had confronted in 1950.

And so, as a result of representations from the Attorney-General and objections from many Senators and Representatives (*e.g.* 100 Cong. Rec. 14611, 14640, 14711, 14713, 14719) the criminal sanctions for membership were stricken from the Humphrey Amendment, and thus Section 4(f) of the Internal Security Act was left intact and operative to bar the prosecution of Communists for membership with knowledge, whether under that Act, the membership clause of the Smith Act, or "any other criminal statute".

Accordingly, the indictment does not charge the petitioner with any offense under the laws of the United States, and the judgment below must be reversed.

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[69] The principal difference, irrelevant here, was that, since the Communist Party was specifically named in the Humphrey Amendment, presumably no proof of its violent purposes would have been required.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT PETITIONER'S CONVICTION UNDER THE SMITH ACT

In affirming the convictions of the defendants in the *Dennis* case, *supra*, this Court stated (at p. 516): "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." In accordance with this declaration, the Court has recently undertaken to review two cases[70] where such doubts have been raised. They are raised even more sharply in the case of Scales.

Intent, activities, and power of evil must be gauged by reference to the indictment and the evidence. The sufficiency of these is a constitutional as well as a statutory question. It is constitutional because, under the rule in the *Dennis* case, the Smith Act's impingement on the First Amendment is warranted only in cases where the evidence sufficiently establishes intent, activities, and power of evil that constitute a "clear and present danger."

A. The Evidence with Respect to Petitioner

Whatever difficulties and close questions the evidence may present in other Smith Act cases, there are few here. No conspiracy has been charged and proved, nor has any advocacy or incitement. To be sure, no such charge or proof is required under the membership clause, but this circumstance does not enhance the sufficiency of the evidence for First Amendment purposes.

The Government offered considerable evidence of Scales' activity as a Party functionary, upon which it heavily relies[71] to establish Scales' knowledge of the Party's

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[70] *Yates* v. *United States* and *Mesarosh* v. *United States*, both *supra* note 15.

[71] See the Government's brief in response to the petition for certiorari, at pp. 5-9.

unlawful aims. But of course Party activities, extensive though they may be, do not necessarily constitute evidence of personal knowledge or intent. As Judge Dimock observed during a Smith Act conspiracy trial:[72] "I think there must be some showing that the activities were such as to bring them [the defendants] in contact with the particular tenets of the Party that are treated as illegal . . ." Mere attendance at Party meetings is poor evidence of knowledge and no evidence of personal intent to overthrow the Government as soon as possible. To support such inferences, the Party activities must somehow be "in contact with" the Party's unlawful aims.

In fact, the evidence with respect to Scales' knowledge (required by the membership clause) and intent (not so required but constitutionally necessary) is so stale and sparse as to be plainly insufficient for either constitutional or statutory purposes. The only testimony relating to any declaration by the defendant or in his presence, wherein overthrow of the Government by force is directly adverted to, concerns a conversation (R. 35) in December, 1948—nearly six years before indictment and three before the limitations period—under circumstances casting such doubt on the credibility of the testimony[73] that it can not possibly support the judgment of conviction. The testimony of the single prosecution witness, Childs (R. 65-96), who parti-

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[72] *United States* v. *Flynn*, C. 136-7 (S. D. N. Y.), aff'd 216 F. 2d 354, convictions of two defendants set aside, 130 F. Supp. 412. The quotation is from the colloquy during argument on motion for a directed verdict of acquittal (Tr. 9961 of C. 136-7).

[73] Scales' alleged statements were said to have been made during his second meeting, and first conversation about the aims of the Party (R. 33-36), with Clontz, an observer for the Federal Bureau of Investigation. Although Clontz saw Scales frequently for the next two years and joined the Party in 1950, he testified to no subsequent declarations of this sort. Assuming that Scales harbored a predilection for violent overthrow, it is most unlikely that he would have revealed it to Clontz as almost a complete stranger in 1948, but never to him as a fellow Party member thereafter.

cipated with Scales in Party affairs during the limitations period, concerns activities that are highly controversial and declarations that are certainly anathema to most Americans, but contains nothing that could possibly support Scales' conviction under the Smith Act.

In the upshot, the prosecution's case amounted to little more than Lautner's testimony about the aims of the Party (none of which was connected with Scales) and that of Clontz and Childs about Party activities and declarations in North Carolina which the jury no doubt found incomprehensible and repugnant, but which were not shown to be unlawful or directed to unlawful ends. There was little to support the verdict other than inferences that might be drawn from Scales' Party membership and office-holding, and these are not sufficient under the Constitution or the Smith Act as expounded in the *Dennis* case. Referring to persons debarred from naturalization for advocacy of violent overthrow of the Government, Justice Reed, dissenting in *Bridges* v. *United States*, 346 U. S. 209, at 234, observed that "there is no necessary identity in law between Communist Party members and such persons". The Government must establish far more than Party membership and activity in order to prove guilty knowledge and intent.[74] But in this case the prosecution was empty-handed, and Scales' conviction must be reversed.

B. The Evidence with Respect to the Communist Party

Finally, the prosecution's evidence in this case with respect to the aims and purposes of the Communist Party

[74] See *People* v. *Lloyd*, 304 Ill. 23, 88, 136 N. E. 505, 530 (1919), *per* Thompson, C. J. (under an Illinois statute comparable to the Smith Act): "Individuals ought not to be condemned for mere membership in organizations, nor should they be held to believe in, advocate, and work to accomplish every word, sentence, or plank in their party platforms . . . There must be proof of a conscious guilt by individual action before it can be said that the individual adopts and approves the language of the party platform."

falls far short of the standards of proof applied in courts of law. Whatever one's personal views on this subject may be, when the Government brings a charge against a Communist under the Smith Act, the charge must be proved.

The Government's principal witness in this matter, Lautner, left the Party in January, 1950, almost two years before the statutory period covered by the indictment. In the conspiracy cases under the Smith Act, testimony antedating the limitations period has been admitted on the theory of a continuing state of facts, but it has never been held sufficient *standing alone* to support the ultimate conclusion.[75]

Taken at face value, Lautner's testimony on the crucial issue of advocacy of force and violence was reduced on cross-examination to an expression of personal opinion that the Party advocates forceful overthrow, despite contrary statements by various Party officials and in Party publications (R. 29-31). This witness, who frequently takes the stand for the Government in Smith Act and other cases where the nature of the Party is an issue, also testified in the *Mesarosh* case, *supra*. Judge Hastie, dissenting,[76] concluded that (223 F. 2d 449, at 463-64):

> ". . . Lautner's opinion was given merely in terms of a generalized revolutionary goal of the Communist group . . .
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> "Lautner did not point to a single thing indicating that the 1945 program contemplated, beyond inculcation of belief in and approval of an ultimate revolution, teaching that the time had now come to work for the overthrow of the existing government as soon as possible . . .

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[75]As strongly indicating the contrary, see *United States* v. *Dennis*, 183 F. 2d 201, 231: "It is *toto coelo* a different question whether we are treating them [circumstances prior to the statutory period] as *media concludendi*, or as the *factum* itself". See also *United States* v. *Lustig*, 16 F. R. D. 378, 379: "It cannot be said with any degree of certainty that the aims and objectives of the Communist Party over a period of many years were identical".

[76]Judge Maris concurred in Judge Hastie's opinion.

> "If Lautner did not indicate any proximity of the violence against government said to be contemplated by the 1945 program, I have not found such evidence elsewhere in the record."

It is on the basis of such slender evidence of Party aims, and without any proof of his violent intentions, or knowledge of or participation in unlawful activities, that Scales has been convicted and sentenced to prison for six years. If the evidentiary standards announced in the *Dennis* case are to retain any practical significance, this judgment must be reversed.

IV. THE PETITIONER WAS DENIED A FAIR TRIAL

The petitioner's indictment and trial were vitiated by numerous prejudicial errors, of which four are before this Court for review on certiorari.

A. The Grand Jury was Illegally Impanelled

Prior to the trial, petitioner filed a motion challenging the grand jury panel which returned the indictment. The hearing showed (R. 2-8) that the method for securing names of the panel was that the clerks and jury commissioner requested various individuals, such as local sheriffs, superintendents of public schools, bank presidents, and the Chairman of the Republican and Democratic Parties in the counties in the District, to provide the names of persons who were "suitable for jury service" (R. 2-4). The only information received by the jury commission concerning these prospective jurors was their names and addresses. No questionnaires were ever sent to the members of the jury panel either prior to or after placing their names in the box, nor were the individuals who were asked to supply names for jury service ever informed of the qualifications for jurors (R. 4).

The federal statutory provisions (28 U. S. C. 1861 and 1864) governing the qualifications and methods of selecting grand and petit jurors are set forth in the Appendix (*infra*, pp. 51-52). The statute expressly provides that the names of grand and petit jurors shall be "publicly drawn from a box containing the names of not less than 300 qualified persons at the time of each drawing." This provision is mandatory and places upon the jury commission the non-delegable responsibility to see that the panel is drawn from among at least 300 persons, duly qualified in accordance with the statutory standards.

It is apparent that the method used here did not meet the statutory requirements. It was impossible for the jury commission to know whether or not the box contained the names of 300 qualified persons at the time of the drawing. All that the jury commission knew was the name of the person and his address.[77] The commission knew nothing of the prospective juror's age, ability to read and write, mental or physical condition, character, intelligence or previous penal history. Nor were the persons who supplied the names informed of the qualifications for jurors.

The purpose of the statutory scheme for jury selection is to provide qualified jurors who are fair and impartial. A person presented before a grand jury, as well as the Government, has the right to have the prospective jurors drawn from a box containing the names of three hundred qualified jurors. In *United States* v. *Silverman*, 129 F. Supp. 496 (D. Conn. 1955), a challenge to the grand jury panel in a Smith Act case was upheld; and the indictment dismissed. The court held (at p. 511):

> "The failure by the jury commission to have determined that there were at least three hundred quali-

[77] In some cases, the people who supplied the names commented on some of the individuals, such comments being usually that they were fit for jury service (R. 4).

fied names in the box at the time of the drawing of the grand jury . . . was a breach of the affirmative statutory duty imposed upon the commission and is fatal to the indictment . . ."

This defect in the procedure of selecting jurors, which was caused by the nonfeasance of the jury commission, invalidates the conviction even without a showing of prejudice to the defendant. For ". . . reversible error does not depend on a showing of prejudice in an individual case. . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts". *Ballard* v. *United States,* 329 U. S. 187, 195.

The method of selecting jurors was also an illegal delegation of the jury commission's duties. It is the duty of the clerk to select the names that go into the jury box, and that duty cannot be delegated. *Glasser* v. *United States,* 315 U. S. 60; *United States* v. *Murphy,* 224 Fed. 554. The names supplied by sheriffs, superintendents of schools, presidents of banks, and Chairmen of the Republican and Democratic Parties would be most unlikely to result in a panel consisting of a fair cross-section of the community. Under such circumstances, the jury panel is invalid. *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217.

B. Prejudicial Error was Committed in the Admission of Evidence Against the Petitioner

The trial of Scales was conducted on the apparent assumption that once it had been shown that he was a Communist, anything ever said or written by any other Communist was admissible against him, to prove the unlawful aims of the Communist Party. The result was the erroneous admission of much damaging evidence which

was not binding on Scales, and much that was irrelevant to the issues in the case and highly inflammatory.[78]

For example, the trial judge admitted a large amount of evidence concerning political, social, and economic causes supported by the Communist Party, that bore no relation to the issue of force and violence. Thus the witness Childs was allowed to testify (R. 78-79 and 91) to anonymous Communist statements to the effect that "the Communist Party does not look upon the Negro question as a question of a minority group . . . it looks upon the Negro question as a question of a Negro nation . . . concentrated in Virginia, North Carolina, South Carolina, and down throughout the South, and . . . these people have the right to set . . . up an entirely separate nation in the South because of Stalin's definition." The same witness testified to other hearsay declarations of Communists about the war in Korea (R. 81, 85) which were equally irrelevant and calculated to antagonize and prejudice the jury.

Likewise, the prosecution witnesses were permitted to describe episodes that bore in no way on the issues, but were exceedingly prejudicial. Childs, for example, described (R. 93-94 and 96) a "demonstration" at a Party school (not part of the curriculum but during a recess) at which a Communist explained how a pencil could be used to kill a man on a picket line. The prosecuting attorney was not bashful about exploiting testimony of the foregoing type in his summation to the jury (R. 105-106).

Equally serious was the trial court's admission of extensive testimony by Lautner and Clontz concerning acts and declarations of third persons that did not take place in Scales' presence. The court below approved the receipt of this evidence (227 F. 2d at 589) as showing "the teachings

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[78] Evidentiary issues of this type are common to many Smith Act appeals, and are presently before this Court for review in the *Lightfoot* and *Mesarosh* cases, *supra*, respectively notes 11 and 15.

carried on by the Party". But the governing issue was what Scales understood those teachings to be, and evidence of other persons' acts or declarations would be competent only if shown to be in the presence or range of perception of the accused. As this Court declared in *Schneiderman* v. *United States*, 320 U. S. 118, 147:

> ". . . it is normally true . . . that it is unsound to impute to an organization the views expressed in the writings of all its members, or to impute such writings to each member."

C. Prejudicial Error was Committed By Denial of Petitioner's Request to Examine Written Statements Furnished to the Federal Bureau of Investigation by Prosecution Witnesses

Before trial the defendant moved (Rule 17(c) of the Federal Rules of Criminal Procedure) to examine the written statements previously furnished to the Federal Bureau of Investigation by the prosecution witnesses Clontz and Childs. The trial judge did not grant the motion, but examined the statements himself *in camera* after the witnesses had testified, to determine whether there were inconsistencies between the reports and the testimony. The judge stated, however, that he would not consider an omission of any matter testified to as an inconsistency (R. 96). He found no inconsistency.

The court's refusal to allow the defendant to examine these statements of witnesses who had taken the stand was prejudicial error. See *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 221, where it was held that ". . . any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena." See also *Fryer* v. *United States*, 207 F. 2d 134; *United States* v. *Bryson*, 16 F. R. D.

431; *United States* v. *Schneiderman*, 106 F. Supp. 731.[79] It is one of the functions of cross-examination to develop inconsistencies in a witness' testimony, and the Court should not usurp this function.[80] Furthermore, the court was plainly wrong in ruling that it would not regard omissions as having evidential significance. It is a general principle of evidence that "a failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact." 3 Wigmore, *Evidence* (3d.Ed., 1940) 733. The defendant was entitled to bring any inconsistency or omission to the jury's attention, and the Court's refusal to allow this denied petitioner a fair trial.

D. A Fair Trial was Precluded by the "Congressional Findings" in the Internal Security Act of 1950 and the Communist Control Act of 1954.

The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal Security Act of 1950 (50 U. S. C. 781) deprived the petitioner of the opportunity for a fair and impartial trial. The findings in the latter statute have already been described.[81] The former finds that the Communist Party

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[79]See 64 Harv. L. R. 1013 (1951): "There would seem to be no sound reason why a defendant in a criminal trial should not have access to all the relevant materials which the Government has in its possession except, perhaps, where such discovery may compel the Government to reveal valuable sources of information. Certainly, as measured by the consequences, the need for discovery here may be greater than in civil cases. In balancing the opposing interests, the importance of a fair trial requires that this aspect of the adversary element in a criminal case be reduced to a minimum."

[80]In *United States* v. *Lebron*, 222 F. 2d 531, the Court of Appeals for the Second Circuit upheld the trial court's refusal to allow the defendant to examine a witness' prior statements, after he had read them and found nothing inconsistent. But it was required that the statements be sealed and made a permanent part of the record, so that the appellate court could itself determine whether there were any inconsistencies.

[81]*Supra*, p. 29.

"is in fact an instrumentality of a conspiracy to overthrow the government of the United States" and is dedicated "to the proposition that the present constitutional government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence".

The indictment here charges and the Government offered proof that the Communist Party advocates the violent overthrow of the government. On this issue of fact, the defendant was entitled to a fair trial, before a jury able to reach an independent, objective and impartial verdict on the evidence. *Cf. Moore* v. *Dempsey*, 261 U. S. 86; *Frank* v. *Mangum*, 237 U. S. 309; *Manley* v. *Georgia*, 279 U. S. 1. For the jury here to find that the Communist Party does not advocate the violent overthrow of the government, it would have had to flout the Congressional finding.

In the face of this Congressional finding, it was impossible for the jury to determine the question of violent overthrow on the basis of an independent, objective and impartial viewing of the evidence. *Cf. Delaney* v. *United States*, 199 F. 2d 107.

CONCLUSION

The statute under which Scales has been convicted is in conflict with the overall pattern of legislation in the field of national security, as Congress soon realized when it was shaping the Internal Security Act of 1950. Whether or not the registration provisions of that Act are either wise or constitutional is not here at issue. Wise or unwise, they embody the deliberate purpose of Congress. Manifestly, that purpose would be most effectively frustrated by the constitutional consequences of enforcing the membership clause against Communists. This danger was clearly perceived in Congress, and steps were taken to

ward it off by language added to the Act for that specific purpose. It is remarkable that the Government should have embarked on prosecutions such as this one, so patently at war with Congressional purpose and so dangerous to the effective administration of the Internal Security Act.

The membership clause itself does not embody the considered judgment of Congress, but merely a hasty copying from state statutes enacted in a period not notable for calm or reflective judgment. As Justice Brandeis remarked,[82] the statute undertakes to punish "association with those who propose to preach" a doctrine. As a concept of criminal liability this is novel, noxious, and unnecessary, and this Court should give it no countenance.

It is respectfully submitted that the judgment of the court below should be reversed.

August 24, 1956

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[82] *Whitney* v. *California*, 274 U. S. 357, 373.

APPENDIX

1. Constitution of the United States:

(a) Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(b) Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Statutes

18 U. S. C. Section 2385 (the Smith Act):

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

50 U. S. C. Section 783 (the Internal Security Act of 1950):

(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

* * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

50 U. S. C. Sections 841 and 843 (the Communist Control Act of 1954):

Section 841. The Congress finds and declares that the Communist Party of the United States, although

purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchial chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the

United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

Section 843. (a) Whoever knowingly and willfully become or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes, or objectives the establishment, control conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

28 U. S. C. Section 1861 (Qualifications of jurors):

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.*

28 U. S. C. Section 1864 (Manner of drawing names of grand and petit jurors):

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

* * *

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

* * *

*Section 9.1 of the General Statutes of North Carolina states that a juror must be a person who resides in the county, who is over 21 years of age and who is "of good moral character" and has "sufficient intelligence to serve as a member of grand and petit jurors". The statute excludes from jury service all those "who have been convicted of any crime involving moral turpitude or who have been adjudged to be *non compos mentis*".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 23

JUNIUS IRVING SCALES,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

JUNIUS IRVING SCALES, *Petitioner*, v. UNITED STATES OF AMERICA.	No. 29

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

I.

CONSTITUTIONALITY OF THE MEMBERSHIP CLAUSE

In support of the constitutionality of the membership clause, the Government has resorted to several arguments and devices which call for comment.

(1) The Government reads words into the membership clause which are not there. The clause proscribes *membership* in a group with *knowledge* that its purpose is to advocate the overthrow of the government by force and violence. The Government now proposes (Govt. Br. pp. 41, 44-45) to read into the clause not only a requirement of personal intent to overthrow the government (an addition which is at best of dubious validity, Pet. Br. pp. 17, 23), but also a restriction to "active" membership.

There is not the slightest warrant in the language or structure of the Smith Act to support the Government's

proposition. In *Galvan* v. *Press*, 347 U. S. 522, this Court refused to read even the requirement of personal knowledge into the Communist deportation provisions of the Internal Security Act. In the present case, as has been pointed out (Pet. Br. pp. 16-17), Congress added the requirement of personal knowledge to the membership clause by specific amendment to the bill which became the Smith Act. Had Congress wished also to add the requirements of personal intent and activity, it could readily have done so.

But even if the clause be construed as limited to "active" membership, its constitutionality would not be aided. Activity as a member of a group may be innocent or criminal. As this Court stated in the *Dennis* case (341 U. S. at 516) it is "the nature of their [Smith Act defendants'] activities" that touches the constitutional issue. The other provisions of the Smith Act undertake to punish various types of activity, conspiratorial or individual. But the membership clause does not, and its constitutionality can not be saved by the Government's attempt to read into the clause everything else in the Act.

(2) The Government strains to maintain simultaneously the discordant propositions, both unsound, that (a) the charge under the membership clause is tantamount to a charge of conspiracy, and (b) the existence or non-existence of a conspiracy is irrelevant to the constitutionality of the Smith Act's application in a particular case.

In support of the first proposition, the Government appears to maintain that every member of the Party is *ipso facto* a conspirator with the other members to achieve unlawful ends. Thus, referring to the doctrine of "democratic centralism", the Government concludes (Govt. Br. p. 10) that ". . . there is no place in the Party for those who would oppose its program of forceful and violent overthrow of the Government." And subsequently the Govern-

ment (Govt. Br. p. 42) quotes approvingly from Mr. Justice Jackson's separate opinion in *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 431-32, the declaration that "Every member of the Communist Party is an agent to execute the Communist program" and the conclusion that "Individuals who assume such obligations [membership in the Party] are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party's program."

It is one thing to uphold a statutory provision intended to stop Communist Party members from serving as labor union leaders (as was done in the *Douds* case), and quite another thing to uphold a criminal statute intended to put Communist Party members in jail.[1] It is one thing for courts to rule that a conspiracy among the leaders of the Communist Party is a clear and present danger, and quite another for them to rule that every member is a conspirator and that therefore individual membership is a clear and present danger.

Of course, Communist Party membership can not be regarded as automatically carrying with it the conspiratorial and criminal attributes which the Government seeks to attach. *Schneiderman* v. *United States*, 320 U. S. 118; *Herndon* v. *Lowry*, 301 U. S. 242. Congressional investi-

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[1]It is clear that, in the passages from his opinion in the *Douds* case upon which the Government relies, Justice Jackson was expressing his opinion about Communist Party membership in general, and as a basis for regulatory action, rather than a postulate for application to individuals. Indeed, he supported his opinion upholding a portion of "non-Communist affidavit" provision reviewed in the *Douds* case by pointing out that that statute does not do precisely what the membership clause does do (339 U. S. at 434): "But it is important to note what this Act does not do. The Act does not suppress or outlaw the Communist Party, nor prohibit it or its members from engaging in any above board activity normal in Party struggles under our political system. . . . *No individual is forbidden to be or become* a philosophical Communist or *a full fledged member of the Party*" (emphasis supplied).

gations and other inquiries have made it a matter of common knowledge that people have joined the Communist Party for and with the most diverse reasons and intentions, many of which, however foolish, are quite devoid of any criminal quality whatsoever.[2] Indeed, the Government itself in Smith Act conspiracy cases has freely conceded that there are many Communist Party members who are not party to any criminal conduct or conspiracy, and has called, as prosecution witnesses, former Party members who testified that their intentions as Party members had nothing to do with force and violence or any other criminal objective.[3]

Not content with grafting intent and activity onto the membership clause, the Government now seeks to make it encompass the whole notion of conspiracy, and argues (Govt. Br. p. 45) that the clause "partakes of the concert-of-action, combination, and acting-together which characterize conspiracy". If that is the burden of the Government's accusation against Scales, let him be indicted on that basis. Let the persons with whom he concerted, combined, or acted be named, and the concert, combination, and joint action be proved. This effort on the Government's part to identify membership with conspiracy renders either the conspiracy or the membership provisions of the Smith Act meaningless surplusage,[4] and manifests an altogether

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[2]See e.g., *The Communist Party of the United States of America—A Handbook for Americans*, printed by the Senate Internal Security Subcommittee for the use of the Senate Committee on the Judiciary (84th Cong., 1st Sess., Dec. 21, 1955), pp. 42-50.

[3]See, e.g., the brief (at p. 13) for *amici curiae* Hall and Kuzma, filed in *Yates* v. *United States*, Nos. 6, 7 and 8 (Oct. Term, 1956), based on *United States* v. *Fujimoto*, No. 13915 (C. A. 9th), Tr. 1456, 7148-49, 7397-98, 14690, and 14696.

[4]It should not be overlooked that the original Smith Act (in effect from 1940 to 1948), as well as the version in force since June 24, 1956 (Govt. Br. p. 2 footnote 1), contains its own conspiracy provision. It is inconceivable that Congress intended the membership clause to be merely a duplicate of the conspiracy clause, but that is essentially what the Government contends and what the lower court held (227 F. 2d at 587).

extraordinary disregard for elementary principles of criminal law (Pet. Br. pp. 23-28).

Along with this painful effort to make membership the same as conspiracy (so as to bring this case within the Court's statements about conspiracy in the *Dennis* case), the Government argues that the presence or absence of conspiracy doesn't really matter (so as to avoid being torpedoed by the Court's statements about conspiracy in the *Dennis* case). "In itself, the particular word 'conspiracy' is obviously not the key to the constitutional problem", we are told (Govt. Br. p. 47). It is interesting to compare the Government's brief in *Mesarosh* v. *United States*, No. 20 (October term, 1956), where it is stated (at p. 60):

> "It is the existence of such a highly-organized conspiracy with rigidly disciplined members . . . which justifies the constitutional limitation of First Amendment rights. *Dennis* v. *United States*, 341 U. S. 494, 509-11."

Conspiracy or no, the Government here seeks (Govt. Br. p. 45) to support Scales' conviction as a Party member on the ground that his conduct involved "concert-of-action, combination, and acting-together". But Scales has been convicted under a statute which does not proscribe and an indictment which does not charge any of these things, and the Government's effort must fail.

(3) The Government misstates the bearing on this case of Justice Brandeis' concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 372. Inasmuch as the California statute there in question proscribed membership in as well as the organization of groups advocating criminal syndicalism, an opinion concurring in an affirmance of the conviction (Govt. Br. p. 47) "could not have been consistent, therefore, with a view that a statute denouncing 'membership' as a crime was void on its face."

This analysis is faulty, in that it overlooks that Justices Brandeis and Holmes concurred in the result in the *Whitney* case only because the defendant had not, in the California courts, challenged the statute's constitutionality under the clear and present danger test. See *Whitney* v. *California*, 274 U. S. at 379; *Dennis* v. *United States*, 341 U. S. at 513-14. On that ground, had the point been raised below, the California statute might have been held "void" on its face, and Justice Brandeis' opinion leaves little doubt that he and Justice Holmes would have so concluded. Since the point was not raised, and since there *was* evidence linking the defendant with "a conspiracy . . . to commit present serious crimes" quite distinct from advocacy, Justices Brandeis and Holmes concurred in the result, while abjuring the reasoning of the Court's opinion.

(4) The Government attempts (Govt. Br. pp. 49-51) entirely to eliminate the element of *probability* of evil consequences from the clear and present danger test. It is true, as was stated in the *Dennis* case (341 U. S. at 509), that "an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent." On the same principle, of course, it is a crime for a one-armed midget to assault Rocky Marciano. But (and this is an important matter frequently overlooked in the Government's brief)[5] the Smith Act does not proscribe and Scales' indictment does not charge "an attempt to overthrow the Government by force".[6]

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[5]See, *e.g.*, the Government's reliance (Govt. Br. p. 59) on Lautner's testimony that "the ultimate aim of the Communist Party" is violent governmental overthrow, and on Clontz' testimony to the same effect (Govt. Br. pp. 93-94). Of course, the "ultimate aim" of the Communist Party is irrelevant to the Smith Act, wherein the only question is what the Party *advocates*.

[6]Conspiracies to overthrow the Government are punishable under 18 U. S. C. 2384. See Mr. Justice Douglas' dissenting opinion in the *Dennis* case, 341 U. S. at 581.

An actual revolt, or an attempt or conspiracy to revolt, is a crime no matter how desperate, and raises no problem under the First Amendment. But the Smith Act proscribes nothing but advocacy, and the clear and present danger test must be met. Obviously, a conspiracy of Party leaders to advocate force and violence and organize the Party to that end is far more pregnant with the substantive evil than the circumstance of individual membership in the Party. And the Government cannot make these things lie level on the scales, for the element of probability is specifically included in Judge Learned Hand's test, as approved by this Court in the *Dennis case* (at p. 510): "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Under this test, under the logic of Justice Brandeis' opinion in the *Whitney* case, and under the constitutional provisions and traditions[7] on which this Court's decisions are based, the membership clause must be held unconstitutional.

II.

SECTION 4(f) OF THE INTERNAL SECURITY ACT

The Government's response, to petitioner's argument (Pet. Br. pp. 28-34) that this prosecution is barred by Section 4(f) of the Internal Security Act, depends upon the following propositions:

(a) The purpose of Section 4(f) is to ensure that the membership clause of the Smith Act, which expressly requires knowledge as an element of the offense, will not be

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[7]It is interesting to note that the English statute of 1799, directed against membership in certain societies (Pet. Br. pp. 13-14), was closely linked in mutual influence and stimulus with our own Alien and Sedition Acts. See Dauer, *The Adams Federalists* (1953), pp. 157-59; J. M. Smith, *Freedom's Fetters* (1956), p. 67.

construed to punish membership without knowledge (Govt. Br. pp. 55-56).

(b) Section 4(f) should be construed in such a way that it has no limiting or other meaningful effect on any other statutory provision (Govt. Br. p. 55).[8]

(c) Section 4(f) should be construed in such a way that all Communists can avoid, by pleading self-incrimination, compliance with the registration provisions of the Internal Security Act, except Communist Party members (and officers!) who are inactive, who do not know the unlawful purposes of the Party as found by Congress,[9] and who have no intention of carrying those purposes into effect (Govt. Br. 51-56, which contains not a word in reply to petitioner's argument in its brief, pp. 32-33, pointing out that such is the inevitable consequence of the Government's position).

Where such arguments are put forward by skilled lawyers, it is a fair inference that there are no better ones.

III.

IMPANELLING OF THE GRAND JURY

Petitioner's motion challenging the grand jury panel was made before trial, and the motion was considered by the trial judge on its merits. The Court of Appeals (227 F. 2d 581, 592) also ruled on the merits of petitioner's chal-

[8] The government's remark (Govt. Br. p. 55) that if the membership clause "did not cover Communists, it would be unlikely to cover anybody", is apparently frivolous, as earlier in its brief (p. 33) it points out that the Smith Act is also directed against Nazi and Fascist movements.

[9] See 50 U. S. C. 781 (15), specifically referring to Communist "indoctrination" for the violent ends specified in the other paragraphs of this section.

lenge, and made no reference to the Government's contention that there had been a waiver. Under these circumstances, and since the petitioner complied with the basic requirement of Rule 12 that such a motion be made before trial, this Court should consider the merits of the challenge.[10] *Ballard* v. *United States*, 329 U. S. 187, 190; *Wrightson* v. *United States*, 222 F. 2d 556.

The Government, in discussing the merits of the challenge, ignores *United States* v. *Silverman*, 129 F. Supp. 496, 509, upholding a challenge to the grand jury panel where, as in this case, the jury commission did not know whether or not the box contained the names of at least three hundred qualified persons.[11] Likewise, the Government ignores this Court's decision in *Ballard* v. *United States*, *supra*, that the petitioner need not show that he, individually, was prejudiced, if in fact the grand jury was illegally impanelled.

October 5, 1956

Respectfully submitted,

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[10]In the *Carruthers* and *Wright* cases cited in the Government's brief (p. 66) the defendant was held to have waived his right to challenge because he made his motion after trial and conviction.

[11]In an attempt to show that the box contained the names of at least three hundred qualified persons, the Government overstates Mr. Cowles' and Mr. Reynolds' (the jury commissioners) testimony. Mr. Cowles at various times placed the number of names in the box at 500, more than 300, probably 400, and 450 (Motion Tr. 83, 84) and stated that he did not know all or practically all the people whose names went into the jury box, but that he had "a pretty good knowledge of the people there, their background and present status" (Motion Tr. 84). Mr. Reynolds stated (Motion Tr. 89) that the potential jurors were not asked about their citizenship status or residence in the district.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 3

JUNIUS IRVING SCALES,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER ON REARGUMENT

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IN THE

Supreme Court of the United States

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JUNIUS IRVING SCALES, *Petitioner*, v. UNITED STATES OF AMERICA.	No. 3

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER ON REARGUMENT

In its Supplemental Memorandum on Reargument, the Government has conceded (pp. 3-5) that the membership clause of the Smith Act, as written, is unconstitutional. The Government seeks to support the application of the membership clause to the petitioner by adding, either as a "constitutional standard" (p. 4) or as an "integral element of the crime" (p. 5), a limitation to "*active* membership".

Furthermore, the Government also concedes (pp. 1-2) that the judgment convicting petitioner under the membership clause must in any event be reversed. The "suggestions" (p. 3) in the Supplemental Memorandum are now advanced, it is clear, as a desperate invitation to the Court to remand the case for a new trial, instead of directing an acquittal or a dismissal of the indictment. Petitioner's reply to these "suggestions", and further comments on the issue of constitutionality, are set forth below.

1. Petitioner agrees with the conclusion in Part A of the Supplemental Memorandum (pp. 1-2) that, other issues apart, this case would have to be reversed and remanded for further proceedings, in accordance with this Court's decision in *Jencks* v. *United States,* 353 U. S. 657.

2. Other issues apart, reversal would also be required by this Court's decision in *Yates* v. *United States,* 354 U. S. 298, that the Smith Act is to be construed as punishing not mere doctrinal advocacy of force and violence, but only the advocacy of action directed to that end. In that case, the Court also held that the evidence relating to the Communist Party was quite insufficient to establish advocacy of action, and that therefore the Party could not be regarded as "the nexus between these petitioners and the conspiracy charged."

In the present case, Scales is not charged with conspiracy to advocate force and violence,[1] but only with knowing membership in a group of persons who so advocate, to wit, the Communist Party of the United States (R. 1). The evidence in this case with respect to the advocacy of the Communist Party is, as the United States declared in its Main Brief (pp. 7 and 57), essentially similar to "and in some respects identical with" the evidence in other Smith Act prosecutions, including the *Yates* case. As readily appears from the Government's own summaries of the evidence concerning the Communist Party of the United

[1]Therefore, the evidence with respect to petitioner's own utterances, or statements made by others in his presence, is irrelevant. Assuming the sufficiency of such evidence to show action-inciting advocacy, it might sustain a charge of advocacy or conspiracy to advocate. But petitioner is not so charged, nor is he charged with membership in any local group or Party faction to which action-inciting advocacy might be attributed on the basis of this evidence. Petitioner is charged only with membership in the Communist Party of the United States, and the decision here is governed by the decision, based upon a concededly similar record of evidence with respect to that Party, in the *Yates* case.

States (main Brief pp. 7-10, 56-59, and 80-94), there is nothing to support a finding that the Party, while Scales was a member, advocated action to bring about the forceful overthrow of the Government. Certainly there is nothing more than, if as much as, there was in the *Yates* case.

Accordingly, there was a failure of proof that the group, in which petitioner is charged with membership, is within the ambit of the Smith Act as interpreted in the *Yates* case. *A fortiori,* there was also a failure of proof that petitioner knew the Party to be such a group. And since there is absolutely no reason to anticipate that the evidence with respect to the Party could be "clarified to the advantage of the Government" (354 U. S. at 328) upon a new trial, the judgment should be reversed and an acquittal should be ordered on this ground, were it not for the other issues in the case.

3. The questions discussed in the two paragraphs above are not reached unless the indictment states an offense under the Constitution and laws of the United States. This is not such a case as *United States* v. *Auto Workers,* 353 U. S. 567, where the indictment was dismissed by the District Court on the basis of an erroneous interpretation of the statute, and the constitutional issues were presented to this Court without prior consideration below, and without "an adjudication on the merits" based on a record. Petitioner here has been tried and convicted, his constitutional and statutory arguments have been considered and rejected below, and the record upon which his conviction was based is before this Court. There is no possible justification for remanding this case for a new trial without first determining whether the indictment states an offense.

On the statutory issue arising under Section 4(f) of the Internal Security Act of 1950, petitioner rests on his briefs submitted prior to argument at the preceding term of

court. If the Court decides the statutory issue adversely to petitioner, the question will then be presented whether the membership clause, admittedly unconstitutional on its face, can be saved by judicial amendment.

4. It is hard to believe that the Government's contention in Part B.1 of its Supplemental Memorandum (pp. 3-5) is seriously intended. Obviously, the degree of an accused's individual "activity" in a group cannot be made an "external constitutional limitation" on the application of the Smith Act, analogous to the "clear and present danger" standard.

The "clear and present danger" doctrine is not peculiar to the Smith Act. It is a principle of limitation upon the general language of the First Amendment, and that Amendment, so limited, applies to any statute which impinges on matters to which the Amendment relates. As applied to political advocacy, the test (as rephrased by Judge Learned Hand and approved by this Court in *Dennis* v. *United States*, 341 U. S. 494, 510) requires a judicial determination of a mixed question of fact and public policy.[2]

But the degree of petitioner's "activity" as a member of the Communist Party presents only an issue of fact about his individual conduct. It is not a general principle of constitutional breadth; its determination would not require a judgment on matters of law or policy. If "activity" were to be made an issue in Smith Act proceedings, it would necessarily be one for jury determination, just

[2]See *United States* v. *Dennis*, 183 F. 2d 201, 215-16. It may be noted that, in other contexts, even questions of this broad and public type are sometimes left to juries. *Cf. Mitchell* v. *Harmony*, 13 How. 115, holding that the military seizure of private property is justified only where a jury has found that there was "immediate and impending danger" of its capture by the enemy, or "urgent necessity for the public service, such as will not admit of delay."

as is the issue whether the advocacy in which a defendant is involved is of an "action-inciting" type.

5. Accordingly, if the test of individual "activity" were to be imported into this case, it could only be as an additional element of the crime under the membership clause. But for such a construction of the clause there is not the slightest warrant, in either its language or legislative history. Of course, petitioner fully recognizes the principle that statutes should, if possible, be construed so as to favor their constitutionality. It does not follow, however, that the language of a statute can be treated as merely the pedestal of a statue. In this case, the Government seeks (main Brief pp. 39-47, Supp. Mem. pp. 3-7) to erect on the statutory pedestal an elaborate structure composed of (a) intent, (b) "activity", and (c) membership which is "tightly disciplined, quasi-military, deeply conspiratorial" and "partakes of the concert-of-action, combination, and acting-together which characterize conspiracy." This endeavor makes a mockery of all principles of legislative construction.

6. The Government's "suggestion" is not only desperate but also futile. For even if the word "active"[4] were to be read into the statutory proscription of membership, the constitutionality of the membership clause would not be saved. The five defendants whose acquittal was directed in the *Yates* case had been exceedingly "active" in the Communist Party as organizers, journalists, teachers, and public protagonists. But, as the Court observed (354 U. S. at 330), "... none of them has been engaged in or been asso-

[4]Petitioner will pass without other mention the painful and surely unconstitutional vagueness of this requirement, abundantly apparent from the proposed charge to the jury (Supp. Mem. pp. 6-7). What is a "substantial" part of a person's time?

ciated with any but what appear to have been lawful activities. . . ." It appears that the Government is simply unwilling to acknowledge the principles laid down in the *Dennis* and *Yates* cases, and persists in the theory, expressly rejected on the record in the *Yates* case, that the Communist Party is itself an unlawful conspiracy under the Smith Act, and that criminal responsibility attaches to anyone who is (354 U. S. at 329) "actively identified with the Party's affairs."

7. If the constitutionality of the membership clause were to be aided by the addition of new elements of the crime not specified in the language of the clause, this could only be accomplished by adding elements requiring proof of activity of a type which incites to action directed to the violent overthrow of government. But if such elements were to be added to the membership clause, it would then become a redundant duplicate of the other portions of the Smith Act, under which previous prosecutions have been brought.

For the Smith Act specifies the activities which Congress regarded as dangerously calculated to incite to force and violence against the government. Advocacy itself; the organization of advocating groups; the distribution of advocating literature—these activities (individual or conspiratorial), if the advocacy be of the unlawful action-inciting type, are constitutionally punishable by the Smith Act, under the decisions in the *Dennis* and *Yates* cases.

The nature of the Government's dilemma is plain enough. The membership clause is is unconstitutional as written, and efforts to salvage it by judicial amendment must fail either for inadequacy or as rendering the clause meaningless and redundant surplusage. In its main Brief (at p. 45) the government endeavored to amend the membership clause into a conspiracy clause, and fell afoul of redundancy. Now in

its Supplemental Memorandum, the Government's "suggested" amendment would, if enacted, be inadequate to satisfy the constitutional requisites.

8. The Government's "suggestion" compounds the confusion of its position on the meaning of Section 4(f) of the Internal Security Act. That Section provides that neither membership nor "the holding of any office" in the Communist Party shall constitute *per se* a violation of any criminal statute. The Government's "suggestion" thus introduces into the legislative pattern the remarkable concept of the inactive office-holder. Under the Government's theory, only "inactive" or "passive" Party officials would remain within the purview of Section 4(f). By necessary consequence of this theory, all "active" members and officers could escape the registration provisions of the Internal Security Act under the self-incrimination clause of the Fifth Amendment.

9. During the argument of this case at the last term of Court, question was raised from the bench concerning the bearing on the constitutionality issue of *Bryant* v. *Zimmerman*, 278 U. S. 63. That case involved a New York statute requiring associations, in which the taking of an oath is a condition of membership, to file reports with the Secretary of State. The statute makes it a misdemeanor to remain a member of such a society with knowledge that it has failed to file reports required by the law.

The *Bryant* case has no bearing on the present case. The statute there in question does not suppress or penalize membership in the societies to which the law applies. It is a registration measure somewhat analogous to the registration provisions of the Internal Security Act (50 U. S. C. §§ 783, 786-88), and its only sanctions are directed not at membership, but at failure to register. The principal issue

raised by the *Bryant* case was the reasonableness of the statutory classification.[5] Societies bound by secret oaths have in the past been the subject of regulatory legislation,[6] and on this basis the law was upheld. But, so far as petitioner has discovered, no federal or state statute other than the Smith Act and its comparable state predecessors has ever undertaken to suppress membership itself, and it is noteworthy that earlier efforts directed to this end failed.[7]

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[5]The New York statute, enacted in 1923, was directed at the Ku Klux Klan. So was a statute enacted in Louisiana a year later, requiring every association (other than churches and the National Guard) to file membership lists with the Secretary of State. Louisiana Rev. Stat. Sec. 12, ch. 5, §§ 401-409; see *Jennings* v. *Lester*, 76 So. 2d 91 (La. App. 1954). It is made a misdemeanor for a member to attend a meeting of a society which has not filed its report.

[6]*Cf.* the British statute of 1817 *punishing* membership in certain oathbound societies, cited in petitioner's main Brief, p. 14. In the United States, in addition to the Klan, the Masons have been the main object of legislative scrutiny. See McCarthy, *The Anti-Masonic Party: A Study of Political Anti-Masonry in the United States 1827-1840*, in the Annual Report for 1902 of the American Historical Association, vol. I, p. 365. In 1833 and 1834 respectively, Vermont and Massachusetts passed laws prohibiting any person from taking or administering any oath other than as required or authorized by law. Vermont Public Acts 1833 c. 20; Laws of Massachusetts 1834; *cf. Strickland* v. *Prichard*, 37 Vt. 324 (1863). In 1834 Rhode Island enacted a law repealing numerous Masonic charters, and requiring all other Masonic groups to file elaborate reports of membership, requirements for admission, and property. Acts of Rhode Island (Jan. 1834) pp. 54-56. The Vermont statute apparently is still in effect. *The Public Laws of Vermont* (1933), ch. 347, secs. 8662-64. It is interesting that the Masons, among certain other groups, were expressly excluded from the scope of the New York statute of 1923.

[7]According to McCarthy, *op. cit. supra* note 6 at pp. 513-53, the anti-Masonic bills introduced in Vermont, Massachusetts, and Rhode Island were prohibitory and far more drastic than the laws as enacted. In Pennsylvania, Thaddeus Stevens in December 1835 reported a bill to the legislature entitled "An Act to Suppress Secret Societies Bound Together by Unlawful Oaths". McCarthy, *supra*, p. 473; Woodbine, *The Life of Thaddeus Stevens* (1913) pp. 22-25. In response to Stevens' inquiries to the then leading presidential aspirants, Daniel Webster approved a prohibition of secret oaths. But William Henry Harrison, while acknowledging that Masonry might be "a proper subject for the deliberation and action of some of the constituted authorities of our country", rejected the proposed pro-

10. The plain fact is that the membership clause of the Smith Act is a flagrant abridgment of freedom of speech and the right of assembly, void by every established criterion of the scope of the First Amendment. It purports to punish membership even though the accused's knowledge of the group's unlawful purposes, and his intent to effectuate them, are confined entirely to his own mind, and are never manifested in any act of advocacy prohibited by the Smith Act, or in any agreement with others to do the acts so prohibited.

This Court has recently held that past membership in the Communist Party is no basis for refusing admission to the bar, and does not support an inference of bad character. *Schware v. Board of Bar Examiners*, 353 U. S. 232; *Konigsberg v. State Bar*, 353 U. S. 252. Where there is no evidence of illegal activity or conspiracy (353 U. S. at 244), there is no legal ground to distinguish long past from recent or present membership. If Party membership is a sign of "woolly mind or naive notions regarding the problems of society" (353 U. S. at 250-51), still that is hardly a sufficient basis for conviction of felony under the laws of the United States.

October 1, 1957.

Respectfully submitted.

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hibitory legislation, saying that he was "certain that there exists no such power either in the whole government of the United States, or of any of its departments, and that the attempt to exercise it would constitute a usurpation of power, pregnant, if tolerated by the people, with mischiefs infinitely more fatal than those which it was intended to remedy." McCarthy, *supra*, pp. 473-79; *The Pennsylvania Reporter and Democratic Herald* (Harrisburg, Jan. 8, 1836), p. 2 col. 2. Stevens' bill failed of enactment by the Pennsylvania legislature.

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JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 626

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals is reported at 227 F. 2d 581.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1955, and a petition for rehearing was denied on November 17, 1955. By order of Chief Justice Warren, the time for filing a petition for a writ of certiorari was extended to January 6, 1956, and by subsequent order of Mr. Justice Clark the time for such filing was extended to and including January 16, 1956. The

petition was filed on January 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the "membership" clause of the Smith Act (18 U. S. C. 2385) is unconstitutional on its face or as applied to the facts of this case.

2. Whether Section 4 (f) of the Internal Security Act of 1950 (50 U. S. C. 783 (f))—which provides in part that neither "the holding of office nor membership in any Communist organization by any person shall constitute per se a violation" of that or any other criminal statute—modified, amended, or repealed the "membership" clause of the Smith Act so as to render it inapplicable to this case.

3. Whether the evidence was sufficient to support the verdict.

4. Whether petitioner was given a fair trial with respect to the composition of the grand jury, alleged bias of the petit jury, production of statements given by Government witnesses before trial, and the examination of certain Government witnesses.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Constitution of the United States, the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954 (50 U. S. C. 841), and pertinent statutes concerning the qualifications and empanelling of

jurors (28 U. S. C. 1861, 1864), are set forth in the Appendix to the petition (pp. 46–51).

STATEMENT

The indictment charged that from about January 1946 and continuously thereafter up to and including the date of its filing on November 18, 1954, the Communist Party of the United States was at all times a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit; that throughout that entire period of time the petitioner was a member of said Communist Party with knowledge that it did so teach and advocate; and that he intended to bring about such overthrow of the Government as speedily as circumstances would permit. After a jury trial before Judge Bryan, sitting by special designation, petitioner was convicted.

Petitioner's membership in the Communist Party within the specified period was conceded at the time of trial (Tr. 1452),[1] and his petition acknowledges that he is publicly known as Chairman of the Communist Party of North Carolina (Pet. 4).

The Government's evidence consisted of testimony from three former members of the Communist Party, together with documentary evi-

[1] "Tr." refers to the typewritten trial transcript.

dence reflecting the aims and purposes of the Party. In proof of the revolutionary context of the Marxist-Leninist program readopted by the Communist Party at its 1945 convention (Tr. 340–42), evidence was presented through the testimony of the witness Lautner [2] who authenticated the basic Marxist-Leninist texts used by the Party in promulgating its program (Ex. 1, 5–15).[3] Lautner testified as to what he was taught at the Party's highest National Training Schools in 1930 and 1941 (Tr. 287, 319); what he as a high ranking official of the Party taught at supervised classes in 1946, 1947, 1948 and 1949 (Tr. 352, 356, 357); and what texts were used at Party schools

[2] Until his defection from the Party in 1950, Lautner had been a high-ranking Party functionary. He attended the National Training School of the Party in 1930 and 1941 (Tr. 287, 334); was a District Organizer in West Virginia from 1936 to 1940 (Tr. 310); taught Party classes from 1946 to 1948 (Tr. 330); was a member of the National Review Commission in 1948; and from 1947 to 1950 headed the New York State Review Commission (Tr. 312).

[3] Not only did Lautner's testimony establish that such Marxist-Leninist classics set forth the revolutionary program of the Communist Party, but the testimony of the other two witnesses demonstrated the petitioner's knowledge and use of the following Marxist-Leninist texts in furtherance of the Party's objectives: *Communist Manifesto* (Ex. 1, Tr. 664, 1057); *Foundations of Leninism* (Ex. 5, Tr. 623, 1058); *Problems of Leninism* (Ex. 6, Tr. 1034); *State and Revolution* (Ex. 7, Tr. 576, 1055, 1058); *Left Wing Communism* (Ex. 8, Tr. 1017, 1020, 1058, 1127); *What Is To Be Done?* (Ex. 9, Tr. 1055, 1127); *Imperialism* (Ex. 10, Tr. 1055, 1057); *History of the Communist Party of the Soviet Union (Bolshevik)* (Ex. 12, Tr. 665, 1058); *Strategy and Tactics of the Proletarian Revolution* (Ex. 13, Tr. 1021).

and circulated by the Party generally (Tr. 290, 302, 320–322, 336, 352, 355, 356).

On the issue of whether the Communist Party, throughout the period alleged in the indictment, taught and advocated the violent overthrow of the Government, the testimony of Lautner—coupled with the testimony of Clontz and Childs and the documentary evidence—was very similar to and in some respect identical with that received in other Smith Act cases, such as *United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2), affirmed, 341 U. S. 494; *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4), certiorari denied, 344 U. S. 922; and *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909.

Petitioner's close relationship to the Party was developed at the trial. He was not just a mere member. Throughout the entire indictment period, he was Chairman of the North and South Carolina District of the Communist Party (Tr. 573, 602, 1137); he maintained close contact with National Party headquarters in New York (Tr. 591, 690, 1070, 1113); he organized meetings at which high Party functionaries spoke (Tr. 585–588, 613, 617); he directed a Party school which was established to train outstanding Communists in the Virginia and North and South Carolina Districts (Tr. 1073).

Since the Communist Party is a rigidly disciplined organization, organizing itself on the principles of democratic centralism (Tr. 404), peti-

tioner could not have received or retained his position as Chairman of a Communist Party district if he disagreed with or acted in ignorance of the Party's basic objectives. Moreover, specific evidence established that petitioner not only was aware of but earnestly and actively supported the Party's teachings, particularly its program of force and violence (Tr. 599–600, 604, 606, 617, 619, 635, 644–647, 1134.)

Witness Clontz[4] testified that on one occasion he posed to the petitioner the question of why Communism cannot be brought to the United States by educating the people, by showing them that this is the best form of government (Tr. 574). Petitioner replied that such a concept was entirely fallacious, since the United States Government owned all the means of communication, as well as the schools, and would not permit the masses of the people to learn the truth about Communism. Petitioner stated that "in order to get the truth to the people you first have to destroy the Government * * * that Stalin and his followers had proved conclusively that ideas alone would never change the form of Government or would never do anything[5] * * * force is the only answer"

[4] Clontz was a confidential informant who, in 1948, infiltrated the Communist Party in North Carolina with the knowledge of the FBI. In the Fall of 1948, he made contact with the Party by writing to petitioner and expressing an interest in the Communist Party. Until he ceased his Communist Party activities in early 1952, he remained in constant and close association with petitioner (Tr. 560–567).

[5] See *State and Revolution* by Lenin, (Ex. 7, pages 19–20).

(Tr. 574–576). In September 1948, Clontz had received from the petitioner a carton of Communist literature (Tr. 562–563) and a letter in which the petitioner advised that he would be glad to discuss the Party's program with Clontz in person (Ex. 24). Petitioner thereupon furnished Clontz with a number of the Marxist-Leninist classics (Tr. 576–78) which outlined the basic aims and objectives of the Party (Tr. 581–83) and suggested that Clontz study them "to learn more about (the) Communist Party and to learn the principles of * * * Marxism-Leninism" (Tr. 583). At subsequent meetings with Clontz during 1949, petitioner continued to supply him with Communist literature and outlined the basic strategy of the Party for bringing about a violent revolution (Tr. 599–600).

In January 1950, petitioner informed Clontz that he was bringing Herbert Aptheker down from New York to address the Karl Marx Study Club (Tr. 613). Aptheker told the group that "a revolution in the United States was a certainty, and a necessity" and would be modeled on the "revolution that took place in Russia" (Tr. 617). Following the meeting, petitioner observed that Aptheker's speech was "one of the clearest statements of Marxist teachings that we would find" (Tr. 619). On January 17, 1950, Clontz, at petitioner's suggestion, became a member-at-large of the Communist Party (Tr. 620; Ex. 29). Pe-

titioner personally continued to tutor Clontz in the principles of Communism to help him "be a better member of the Communist Party" (Tr. 623). In this connection, petitioner gave Clontz a copy of Stalin's *Foundations of Leninism* (Ex. 51), and directed Clontz to use as a guide a study outline of the book which petitioner had personally prepared (Tr. 623; Ex. 30).

In June 1950, petitioner arranged for Clontz to enroll in the Communist Party's Jefferson School of Social Science in New York City (Tr. 650–51, 654; Ex. 33), where Clontz continued his education in Marxism-Leninism (Tr. 655), and upon his return discussed the teachings at the Jefferson School with the petitioner (Tr. 661).

In the latter part of 1951, petitioner advised Clontz that he was going "underground" (Tr. 703), but he continued to remain Chairman of the Carolina District of the Party.

Witness Childs[6] testified that petitioner had advised him that it would be necessary for the Red Army to "liberate" this country if, when the time for revolution arrived, the Communist Party was unprepared to cope with the situation (Tr. 1150, 1063).[7]

[6] Like Clontz, Childs entered the Communist Party for the purpose of acquiring information for the FBI. Childs established contact with the Party in 1948 (Tr. 1013). On December 18, 1949, Childs was introduced to petitioner Scales (Tr. 1019) and thereafter maintained an association with the petitioner until August 1953 (Tr. 1136).

[7] This conversation with petitioner apparently occurred during 1952 (See Tr. 1063–66). Earlier, during the Spring

During the Summer of 1952, Childs attended a Party school, organized and directed by petitioner (Tr. 1066–73). Childs was instructed by petitioner to bring with him certain literature and equipment (Ex. 42) and was introduced by petitioner to one "Abe," who was identified as a representative of the National Committee of the Communist Party (Tr. 1070). The school was held in a wooded area adjoining the farm of a Party member (Tr. 1070). Those in attendance were requested to adopt fictitious names because of reasons of "security" (Tr. 1072). It was pointed out to the students at the school that the works of Marx, Lenin and Stalin "are the basic theory upon which all final decisions (of the Party) are made" (Tr. 1101), and that although the Party "line" may change from time to time the ultimate purpose of the Communist Party, as embodied in the teachings of Marx, Lenin and Stalin, always remains the overthrow of the Government by force and violence (Tr. 1103–04).

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of 1950, petitioner had made a similar statement to the witness Clontz in discussing the subject of permanent revolution, which was defined by petitioner as the concept that the Communist Party in the Soviet Union has a continuing obligation under Stalin's teachings to continue assisting the Communist Parties all over the world until they had overthrown existing capitalist governments, including that of the United States (Tr. 645–46). Petitioner had stated, "as a practical matter that the Soviet Union would not land troops at the commencement of the revolution, that the Communists here would have to start the revolution themselves" (Tr. 646).

ARGUMENT

1. Petitioner attempts to ground his attack on the validity of the "membership" clause of the Smith Act (Pet. 8–12) upon this Court's ruling in *Dennis* v. *United States*, 341 U. S. 494. He construes *Dennis* to hold that imposition of the criminal sanctions under the Act is only justified where there is a showing that the defendant *advocated* or *conspired* to advocate the proscribed doctrine. And he urges that since, in his view, neither of these elements is present here, the "membership" clause fails to meet the test of constitutionality.

Such a narrow construction of *Dennis* is unwarranted. On the contrary, as the court below observed (App. to Pet. 31), the very factors which led to the *Dennis* holding on constitutionality impel the same result in this case. There, the crucial elements were (a) the defendants' knowledge of the unlawful objectives of the Communist Party, (b) their active participation in support and furtherance of those proscribed objectives, and (c) the role of the Communist Party in the world today. Each of those elements is clearly present here. The jury has found that petitioner definitely knew the Party's aim to overthrow the Government by force and violence; he furthered and supported that end by his continued active membership and leadership, particularly his efforts to recruit and indoctrinate

(see the Statement, *supra*, pp. 5, 6–9); and the place of the Communist Party in American and world affairs during the statutory period (Nov. 18, 1951–Nov. 18, 1954) was surely no less significant and no less dangerous than in *Dennis* or in *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909.

At least where, as in petitioner's case, the membership is active and not merely passive or nominal (cf. *Galvan* v. *Press*, 347 U. S. 522, 526–527), it does not seem a tenable argument that, although Congress may punish one who advocates the violent overthrow of the Government or who organizes a group which so advocates, it is without constitutional power to prohibit *membership* in such an organization with knowledge on the part of the member of this unlawful purpose, as well as the intent that it be brought about. Those who retain such active membership in an organization of this type "render [it] aid and encouragement" (*Frankfeld* v. *United States*, 198 F. 2d 679, 684 (C. A. 4), certiorari denied, 344 U. S. 922), contribute to its success, and thereby help it in the achievement of its subversive purpose. This is certainly "a sufficient evil for Congress to prevent". *Dennis* v. *United States*, *supra*, at 509.

Surprisingly, petitioner quarrels, to his own disadvantage, with this Court's holding in *Dennis* that Section 2 (a) (3) of the Smith Act, which embraces the "membership" clause, requires

proof that the accused intends to bring about the violent overthrow of the Government (Pet. 10).* He insists, however, that even if proof of intent be required, the clause cannot be saved since a state of mind comprising knowledge and intent, manfested by nothing more than non-conspiratorial membership, is insufficient to justify restriction of First Amendment rights (*ibid.*). But petitioner fails to recognise that "those who * * * combine for the purpose of advocating overthrow intend to bring about that overthrow." *Dennis* v. *United States, supra,* at 499. Similarly it is the *combining* with others in *active membership,* in an organization advocating the Government's forcible destruction, which constitutes the external manifestation of the illegal purpose here. Such active membership is as much an overt *act* as the "advocacy" which the Court in *Dennis* found sufficient to justify the imposition of the statute's criminal penalties. And in the face of these requirements of specific knowledge and specific intent, the argument that the accused may be convicted for innocent association (so-called "guilt by association") is plainly unsound.

2. As his second point, petitioner relies upon Section 4 (f) of the Internal Security Act of 1950 (50 U. S. C. 783 (f)) as modifying, amending, or repealing the "membership" clause of the

* "The structure and purpose of the statute demand the inclusion of intent as an element of the crime." *Dennis* v. *United States, supra,* at 490.

Smith Act so that it no longer applies to his case. We submit, however, that the Court of Appeals was correct in holding that Section 4 (f)* has no such effect.

First, the words of the pertinent provision of the Smith Act itself show that mere membership in the Communist Party alone does not constitute the offense. As petitioner concedes in his discussion of the sufficiency of the evidence (Pet. 18–20), the statute expressly sets forth, as an additional element, knowledge on the part of the defendant of the purposes of the society, group or assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence. Furthermore, the prosecution must allege and prove that the defendant intended to bring about the Government's violent overthrow as speedily as circumstances would permit. See *Dennis* v. *United States, supra,* at 499. Thus, petitioner has not been convicted on mere proof of Party membership *per se*. The conviction rests on much more—knowing, active, and purposive membership.

Secondly, it is clear, as the court below pointed out, that the "purpose of [Section 4 (f)] as defendant correctly argues," was to insure the enforceability of the registration provisions of the act [Internal Security Act of 1950] by mak-

* As he does also here.

ing the privilege against self-incrimination unavailable as a defense to failure to register" (App. to Pet. 36).[10] That the Congress intended to do no more than this is borne out by the legislative history [11] and by Section 17 of the Internal Security Act of 1950 (50 U. S. C. 796) which limits the application of Section 4 (f) to the provisions of that Act. It provides that—

> The foregoing provisions of this title shall be construed as being in addition to and *not in modification of existing criminal statutes.* [Emphasis added.]

Petitioner also urges that the Communist Control Act of 1954 must be construed to amend or repeal the "membership" clause of the Smith Act, thus barring his conviction. The 1954 Act contains no reference to the Smith Act, nor does its history indicate any purpose on the part of Congress that the later statute repeal, amend or qualify the Smith Act.[12]

3. Petitioner also contends that the evidence is insufficient to meet the requirements of the "clear and present danger" test and that, in any event,

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[10] The same conclusion was reached by the Court of Appeals for the Seventh Circuit in disposing of the same argument made in *United States* v. *Lightfoot* (C. A. 7), No. 11470, decided January 12, 1956, pending on petition for a writ of certiorari, No. 661, this Term.

[11] See 96 Cong. Rec. 14175, 15198.

[12] The legislative history reflects the opposite. See 100 Cong. Rec. 15102–15110, and particularly the remarks of Senators Humphrey and Kefauver at pages 15105 and 15106 respectively.

it does not support the verdict. The evidence, as our Statement reflects (*supra*, pp. 4–9) and petitioner does not seriously challenge, was abundant that the Communist Party, through the circulation of its revolutionary classics, by maintaining schools for the indoctrination of its members, and through other means, teaches and advocates the violent overthrow of this Government. And even a cursory examination of the testimony demonstrates that petitioner—the most important Party leader in North and South Carolina—was familiar with the Party's violent aims and purposes, whole-heartedly supported them, encouraged others to adopt them, and did all within his immediate power to accomplish them as soon as conditions and circumstances would permit. Fully as much as in the Smith Act "conspiracy" cases, the evidence amply supported the finding of the trial judge that there was a sufficient "clear and present danger" to warrant the application of the statute.

Petitioner's principal complaint appears to be that there was no evidence during the limitations period to justify the conclusion that he possessed the requisite knowledge and intent.[13] But the

[13] In this connection, petitioner suggests that the evidence introduced to establish his knowledge of the Party's illegal purposes, which pre-dates the limitations period, lacks all probative value. In response to a similar contention raised below, the court pointed out that the statements attributed to the petitioner, standing uncontradicted,

record is replete with references by the witness Childs to the revolutionary aims and purposes of the Party, petitioner's knowledge thereof, and his intent to accomplish those objectives. For instance, well within the limitations period is Childs' testimony that Scales had advised him that it would be necessary for the Red Army to "liberate" this country if, *when the time for revolution arrived,* the Communist Party was unprepared to cope with the situation (Tr. 1063, 1150). There is the witness' account of the teachings at a Party school, organized and directed by petitioner in the Summer of 1952, that the works of Marx, Lenin and Stalin "are the basic theory upon which all final decisions (of the Party) are made" (Tr. 1101), and that the ultimate purpose of the Party, as embodied in those teachings, always remains the overthrow of the Government by force and violence (Tr. 1103–04). There is also the statement of another member of the staff that "Socialism can be established only through the overthrow of the capitalists" (Tr. 1109), who, the students were told, "would not surrender peacefully" (Tr. 1115). And, again, the record reflects petitioner's direction to the witness to remain in industry where there were unions, "since

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"clearly established knowledge by defendant of the unlawful purposes of the party within the limitation period as well as prior thereto, since the running of the statute of limitations cannot empty a man's mind of knowledge of this sort" (App. to Pet. 41).

the Communist Party considered that trade unions are the schools of revolution" (Tr. 1062).[14]

4. No prejudicial errors were committed in the course of the proceedings leading to the indictment or at the trial.

(a). Petitioner's appeal to this Court to review the lower courts' rulings upholding the method of selection of the grand jury panel is lacking in merit because, first, petitioner waived his right to challenge the method of selection of the grand jury panel, and, second, the method of selection was in fact proper.

Petitioner was arrested on November 18, 1954, and after two extensions to secure counsel he pleaded not guilty to the indictment on December 16, 1954. At that time he reserved his right to file all pre-trial motions, specifically reserving his right to challenge the composition and array of the grand jury. On February 18, 1955, petitioner, represented by counsel of his own choosing, filed several motions requesting dismissal of the indictment on constitutional and other grounds, a bill

[14] Petitioner also seeks (Pet. 18, fn. 25) to cast doubt on the credibility of another of the Government's witnesses (Clontz). But this was clearly a matter for the jury's determination and is not open for review here. In the same category is the contention (Pet. 19–20) that the testimony of Lautner on the revolutionary aims and purposes of the Party was contradicted by published statements of Party officials (who did not testify at the trial). It was for the jury to determine, where the evidence was alleged to be contradictory, what testimony was to be believed and what was not.

of particulars, etc. These motions all were filed within the time prescribed by the court but after two continuances which were granted at the request of petitioner. It was not until shortly before the trial was scheduled to commence on April 11, 1955, that petitioner filed a motion attacking the method of selection of both the grand and petit jury panels. Reserving to the Government its objection as to the timeliness of petitioner's motion concerning the grand jury panel, the trial court conducted a hearing on the merits and, on April 1, 1955, dismissed the motions on the ground that the jury panels represented a fair cross-section of the community and also on the ground that the motion challenging the grand jury was untimely (Motion Tr. 153–154). *Agnew* v. *United States,* 165 U. S. 36; *Frazier* v. *United States,* 335 U. S. 497, 503.

On the question of the merits of the method of selection, the testimony at the hearing showed that the Clerk never intentionally or systematically excluded any class or group from jury service and that he tried to get a wide selection of jurors from all walks of life who were capable of serving (Motion Tr. 47–48). The Clerk and Jury Commissioner made special efforts to secure women and Negro jurors (Motion Tr. 25) and there was no exclusion whatever of minority political or racial groups (Motion Tr. 58). The practice of the Clerk and Jury Commissioner in sending form letters to various individuals and leaders of or-

ganizations asking for suggestions of names was not an unlawful delegation of their duties. *United States* v. *Dennis*, 183 F. 2d 201, 217–218 (C. A. 2); *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F. 2d 414, 419 (C. A. 3); *Walker* v. *United States*, 93 F. 2d 383 (C. A. 8, certiorari denied, 303 U. S. 644.[15]

(b). Petitioner next contends that the Congressional findings contained in the Internal Security Act of 1950 and the Communist Control Act of 1954 necessarily deprived him of a fair and impartial trial because, in the face of this legislation, no jury could reach an independent and impartial verdict. If petitioner's contention were correct, all Communist Party leaders subject to prosecution under the Smith Act would be "immunized from prosecution in definitely." *United States* v. *Lightfoot* (C. A. 7), No. 11470, decided January 12, 1956 (pending on petition for a writ of certiorari, No. 661, this Term).

The fact is, as was observed by the court below, that petitioner "had a fair and impartial trial before an able and experienced trial judge" (App. to Pet. 45). The jury was as impartial as could

[15] Petitioner does not here challenge the composition of the petit jury. At the time of the trial court's denial of petitioner's motions attacking the grand and petit jury panels, the court observed that a revised list of prospective jurors was then being prepared by the jury officials (Motion Tr. 153–154). Petitioner's counsel agreed that the method of selection of the revised list of jurors was satisfactory to petitioner and met all his objections (Motion Tr. 154–164). The jury which tried this case was then chosen from the new panel of petit jurors selected under the revised method.

be secured: "the questions propounded by the judge to the trial jury on the voir dire were sufficient for the selection of an impartial jury and that was all that defendant had a right to ask" (App. to Pet. 43); see *supra*, pp. 18–19. See also *United States* v. *Dennis*, 183 F. 2d at p. 226, where the court stated that "those who may have in fact committed a crime cannot secure immunity because it is possible that the jurors who tried them may not be exempt from the general feelings prevalent in the society in which they live; we must do as best we can with the means we have."

(c). The trial court did not err in denying petitioner's requests to examine written reports made by prosecution witnesses Clontz and Childs to the Federal Bureau of Investigation. The initial motion, made prior to trial, for the production of such records under the provisions of Rule 17 (c), Federal Rules of Criminal Procedure, was a mere fishing expedition, not in any way sanctioned by this Court in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, upon which the petitioner relies (Pet. 23). The trial court plainly did not abuse its discretion in refusing to order such production.

During the course of cross-examination of Clontz and Childs, petitioner again moved for production of these documents. The cross-examination had elicited no information remotely suggesting that the reports contained any state-

ments contradictory to the direct testimony. Upon the Government's objection that therefore no foundation for production had been laid by petitioner, the court required the Government to produce the documents for inspection *in camera*. The court then determined that the reports were not of an exculpatory nature and were otherwise not relevant. In these circumstances, nothing in *Gordon* v. *United States*, 344 U. S. 414, 418–419—which squarely rested on the showing made there of contradiction as to "relevant, important and material matters which directly bore on the main issue being tried"—required that the reports be handed over to petitioner's counsel.[16]

As this Court held in *Goldman* v. *United States*, 316 U. S. 129, 132, a defendant is not entitled as a matter of right to inspect the memoranda of a witness where the witness does not use the memoranda in court, and the trial court's discretionary refusal of production cannot be overturned in the absence of a clear and prejudicial abuse of discretion. See also *Little* v. *United States*, 93 F. 2d 401 (C. A. 8), certiorari denied, 303 U. S. 644, and *Lennon* v. *United States*, 20 F. 2d 490 (C. A. 8); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234.

[16] See also *United States* v. *DeNormand*, 149 F. 2d 622 (C. A. 2); *United States* v. *Ebeling*, 146 F. 2d 254 (C. A. 2); *United States* v. *Simonds*, 148 F. 2d 177 (C. A. 2); *United States* v. *Cohen*, 148 F. 2d 94 (C. A. 2.

(d). Lastly, petitioner contends that there was error in the trial court's admission of evidence concerning the Communist Party's Negro policy, its attitude towards the Korean war, and the appearance of John Gates, editor of the "Daily Worker," at the University of North Carolina.

Evidence relating to each of these matters, however, was clearly admissible to establish petitioner's knowledge of the Party's teachings and program, or, as in the case of Gates, his support of national Party activities, and his personal activity in furtherance of Party policies. Moreover, none of this evidence was introduced *in vacuo*. For example, in the case of the Party's teachings on the right of self-determination of Negroes and the establishment of a separate Negro nation in the South, there was ample evidence to show that this is a basic part of the strategy and tactics of the proletarian revolution (Tr. 599–618).

In the same connection, petitioner also argues that it was error to admit testimony by Clontz and Lautner concerning acts and declarations of third persons outside the presence of petitioner. But this testimony, as the jury was told by the trial judge, was admitted on the issue of whether the Communist Party is an organization which teaches and advocates the violent overthrow of the Government. Proof of this fact was a necessary and material element of the prosecution's case in establishing an offense under the statute.

Thus, Lautner was properly permitted to testify as to the basic aims and objectives of the Communist Party as stated in official Party schools, conventions, and publications (Tr. 341, 342, 351, 354, 356, 358, 359) and to give his opinion, as a former high Party official, of the Party's application and understanding of certain principles of Marxism-Leninism (Tr. 358, 360, 439, 440). See *United States* v. *Lightfoot* (C. A. 7), No. 11470, decided January 12, 1956, pending on petition for a writ of certiorari, No. 661, this Term; *United States* v. *Flynn*, 216 F. 2d 354, 363 (C. A. 2), certiorari denied, 348 U. S. 909; *Frankfeld* v. *United States*, 198 F. 2d 679, 689 (C. A. 4), certiorari denied, 344 U. S. 922; *United States* v. *Mesarosh*, 223 F. 2d 449, 455 (C. A. 3), pending on writ of certiorari, No. 566, this Term; *Wellman* v. *United States*, 227 F. 2d 757 (C. A. 6), pending on petition for a writ of certiorari, No. 529 Misc., this Term — all permitting similar testimony from this witness.

The testimony of Clontz as to the teaching he received at the Jefferson School in New York was manifestly admissible as bearing directly upon petitioner's knowledge of the aims and purposes of the Party, particularly in the light of the witness' testimony that he reported to petitioner from his class notes the substance of what he had learned at that school (Tr. 661).

CONCLUSION

For the reasons set forth herein, we submit that the decision below is correct and need not be reviewed. We are aware, of course, that the Court has decided over the Government's opposition to review *Yates, et al.* v. *United States,* Nos. 308–310, this Term, and *Mesarosh, et al.* v. *United States,* No. 566, this Term, which involve conspiracy to violate the advocacy and organizing provisions of the Smith Act. However, this case involves the "membership" provision of the Smith Act, and the two circuits which have directly passed on the constitutionality and application of the "membership" clause have upheld them.[17] We are not certain of the factors which impelled the Court to agree to review the *Yates* and *Mesarosh* cases, and we believe that the instant case can stand independently of those two cases. But if the Court feels that the three cases are sufficiently interrelated to warrant the issuance of the writ here, we urge that in any event review be denied the trial issues embraced in the fourth

[17] The Fourth Circuit in the instant case, and the Seventh Circuit in *United States* v. *Lightfoot*, *supra.* See also *Frankfeld* v. *United States,* 198 F. 2d 679, 684, 690 (C. A. 4), certiorari denied, 344 U. S. 922, and *Dunne* v. *United States,* 138 F. 2d 137, 143 (C. A. 8), certiorari denied, 320 U. S. 790.

question petitioner seeks to bring here (Pet. 2) (discussed *supra*, at pp. 17–23).

Respectfully submitted.

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No. 83

In the Supreme Court of the United States

OCTOBER TERM, 1956

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 29

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (R. 116–133) is reported at 227 F. 2d 581.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1955, and a petition for rehearing was denied on November 17, 1955 (R. 134). By order of the Chief Justice, the time for filing a petition for writ of certiorari was extended to January 6, 1956 (R. 135), and by subsequent order of Mr. Justice Clark the time for such filing was extended to and including January 16, 1956 (R. 135). The petition was filed on January 16, 1956, and granted on March 26, 1956. 350 U. S. 992. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

399753—56——1

QUESTIONS PRESENTED

1. Whether the "membership" clause of the Smith Act (18 U. S. C. 2385) is unconstitutional on its face or as applied to the facts of this case.

2. Whether Section 4 (f) of the Internal Security Act of 1950 (50 U. S. C. 783 (f))—which provides in part that neither "the holding of office nor membership in any Communist organization by any person shall constitute per se a violation" of that or any other criminal statute—modified, amended, or repealed the "membership" clause of the Smith Act so as to render it inapplicable to this case.

3. Whether the evidence was sufficient to support the verdict.

4. Whether petitioner was denied a fair trial because of

(a) the composition of the grand jury which indicted him,

(b) the admission of evidence offered by the prosecution,

(c) the refusal of the trial court to permit petitioner to examine written statements furnished to the Federal Bureau of Investigation by government witnesses, or

(d) the legislative findings of fact concerning the Communist Party as set forth in the Internal Security Act of 1950 (50 U. S. C. 781) and the Communist Control Act of 1954 (50 U. S. C. 841).

STATUTES INVOLVED

The Smith Act (18 U. S. C. 2385), in its form applicable to this case,[1] provides:

[1] The statute has recently been amended by Public Law 766, 84th Congress, 2nd Session, approved June 24, 1956, to provide

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

---

for an increase of the maximum fine from $10,000 to $20,000 and an increase in the maximum sentence from 10 to 20 years. In addition, this most recent amendment reinstated as part of Section 2385 of Title 18 the special conspiracy provision which had been repealed when the Criminal Code was revised in 1948.

The text of the Smith Act, together with relevant provisions of the Constitution of the United States, the Internal Security Act of 1950, the Communist Control Act of 1954, and pertinent statutes concerning the qualifications and the empanelling of jurors (28 U. S. C. 1861, 1864), are set forth in the Appendix to Petitioner's Brief, pp. 47–52.

STATEMENT

On November 18, 1954, in the United States District Court for the Middle District of North Carolina, an indictment was returned against petitioner charging that (1) continuously from about January 1946, and up to and including the date of the filing of the indictment, the Communist Party of the United States was at all times a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit; and (2) throughout that entire period of time the petitioner was a member of the Communist Party with knowledge that it did so teach and advocate, and that he intended to bring about such overthrow of the Government as speedily as circumstances would permit.

After his arrest on November 18, 1954,[2] petitioner first appeared in court on December 7, 1954. His request for a one-week extension for the purpose of securing counsel was granted. On December 16, he

[2] The essential facts which are recited in this and the succeeding three paragraphs are also set forth in the trial judge's "Finding of Fact, Conclusion of Law, and Order" of April 15, 1955, reproduced as Appendix B of this brief, pp. 95–100, *infra*.

again appeared before the court for arraignment, but was still not represented by counsel. The court thereupon appointed two members of the bar to represent petitioner for purposes of the arraignment. On that day, petitioner entered a plea of not guilty, reserving the right to file appropriate motions by January 14, 1955, and specifically reserving his right to challenge the composition and array of the grand jury.

On December 22, 1954, petitioner was released on bail. On January 14, 1955, the date fixed by the court for the filing of appropriate motions, petitioner was represented by a New York attorney who requested sixty additional days in which to file motions. Acting on this request, the court granted an extension to February 18, 1955, by which time the petitioner was to file his motions, and the court fixed April 11, 1955, as the date for the commencement of the trial. Petitioner's counsel announced complete satisfaction with the dates as set.

On February 18, 1955, petitioner, again represented by new counsel of his own choosing, filed motions to dismiss the indictment on constitutional and other grounds, for bill of particulars, for the return of seized property and the suppression of evidence, for discovery and inspection pursuant to Rule 16, for pre-trial inspection of documents under Rule 17 (c), to strike portions of the indictment, and for continuance of trial.

Argument on these motions was heard by the court on March 8, 1955, and at this time petitioner's counsel advised the court of his intention to file a motion cha-

lenging the method of selecting the grand jurors despite the Government's announced intention to object to the filing of such a motion on the ground that it would be untimely. Petitioner subsequently filed the motion together with a challenge attacking the method of selecting the trial jury. On April 1, 1955, the court, reserving to the Government its objection to the motion challenging the grand jury, conducted a hearing on the method of selecting jurors, since the evidence as to each of the two motions was necessarily the same in substance. At the conclusion of the hearing, the court denied the motion attacking the grand jury panel because

> (1) the motion was not timely filed and
>
> (2) the evidence produced at the hearing failed to show that the method of selecting jurors was improper (Motion Tr. 150–153).[3]

The motion challenging the petit jury also was denied.[4]

The trial commenced on April 11, 1955, and the jury returned its verdict of guilty on April 21, 1955. On April 22, 1955, petitioner was sentenced to six

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[3] "Motion Tr." refers to the typewritten transcript of the hearing held on April 1, 1955, on the pre-trial motion challenging the method of selecting jurors; "R." refers to the printed record; "Tr." refers to the typewritten trial transcript; "Ex." refers to the Government's trial exhibits; and "Def. Ex." refers to the petitioner's trial exhibits.

[4] The trial court observed that a revised list of prospective jurors was being prepared by the jury officials (Motion Tr. 153–154), and when petitioner's counsel agreed that the method of selection of this revised list was satisfactory to him (Motion Tr. 154–164), the court quashed the then existing venire of petit jurors and ordered a new panel drawn under the revised method of selection (Motion Tr. 164), from which the jury which returned the verdict was selected.

years in prison (R. 116). On appeal, the judgment of the lower court was affirmed in all respects (R. 116–133).

The evidence supporting the verdict may be summarized as follows:

COMMUNIST PARTY TENETS AND DISCIPLINE

On the issue of whether the Communist Party taught and advocated the violent overthrow of the government, the testimony of the three government witnesses was closely similar to that received in other Smith Act cases, such as *United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2), affirmed, 341 U. S. 494; *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4), certiorari denied, 344 U. S. 922; and *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909. In addition, the evidence on this issue was very similar to and in some respects identical with that received in the three companion Smith Act cases which are currently before the Court for argument. To avoid burdening the body of our brief with the extensive and relatively familiar materials on this point, we set forth in an Appendix A (pp. 80–94, *infra*) the evidence in the record to support the jury's finding that the Communist Party of the United States, throughout the entire period of the indictment, was a group which taught and advocated the violent overthrow of the United States Government as speedily as circumstances would permit.

Here we add merely a brief reference to the evidence showing how the Party enforces upon its mem-

bers rigid discipline and adherence to Party doctrine through its principle of "democratic centralism" (Tr. 404). The witness Lautner described this concept of "democratic centralism" as follows (Tr. 404):

> Decisions of the National Committee are binding on all Party members throughout the Communist Party in the United States whether they agree with it or not. They must carry out Party decisions. They can object to it, but they must carry it out and later on they can have a hearing whenever they have a disagreement with a decision along the line. But democratic centralism and Party discipline demand that the Party must have a unity of will to act as one.[5]

At the Walnut Cove School, organized and directed by petitioner for the purpose of "training outstand-

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[5] In Stalin's *Foundations of Leninism*, pp. 118–119, introduced by the Government as Exhibit 5 (R. 22, 24–25), the doctrine was authoritatively stated as follows:

"The achievement and maintenance of the dictatorship of the proletariat is impossible without a party which is strong by reason of its solidarity and iron discipline. But iron discipline in the Party is inconceivable without unity of will, without complete and absolute unity of action on the part of all members of the Party. This does not mean, of course, that the possibility of contests of opinion within the Party are thereby precluded. On the contrary, iron discipline does not preclude but presupposes criticism and contest of opinion within the Party. Least of all does it mean that discipline must be 'blind.' On the contrary, iron discipline does not preclude but presupposes conscious and voluntary submission, for only conscious discipline can be truly iron discipline. But after a contest of opinion has been closed, after criticism has been exhausted and a decision has been arrived at, unity of will and unity of action of all Party members are the necessary condition without which neither Party unity nor iron discipline in the Party is conceivable."

ing Communists in the Virginia and North and South Carolina Districts" (*infra*, pp. 21–22), the principle of "democratic centralism" was concretely spelled out as follows to government witness Childs:[6]

> Another consideration was that as Communist Party members we were to remember at all times that the Communist Party always comes first. What that means is that members of the family, if you have a member of the family which is rather hostile towards Communism, well, that is relatively too bad because the Communist Party comes first. The individual who desires, if a person wants to work in a particular location or go in a particular location, he must subject himself to the discipline and directives of the Communist Party. In other words it is not up to him. The Communist Party will do all in its power to convince this person that the goal, that the assignment for that particular person, perhaps the person does not agree with the plans, the person does not even want to do it, but the Communist Party says that the Party comes first, that each person's life must be based on the fact that he or that person is serving the Communist Party [R. 86–87].

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[6] Childs was a confidential informant who reported to the FBI on Party activities in North Carolina from 1948 until 1955, when he appeared as a Government witness in the instant trial (R. 65–96). On December 18, 1949, Childs was introduced to petitioner (Tr. 1019), and thereafter maintained an association with him until August 1953 (R. 95). Childs attended High Point College, North Carolina (Tr. 1012), and at the time of the trial was a student at the University of North Carolina (Tr. 1011).

The extent to which petitioner was imbued with this concept of "democratic centralism" was evidenced by the following statement he made to Government witness Clontz in the year 1949 (R. 39):

> Junius [Scales] explained to me that he was District Chairman of the Communist Party District for the two Carolinas, that the District was an integral part of the Communist Party, U. S. A. Now he explained that actually there was not any visible tie between the Communist Party in all countries, but that the Soviet Union was regarded as the mother country and that the Soviet Union controlled generally the policies handed down by the Communist Party here. He said it was only natural since the Soviet Union was the mother country of the working class that the Soviet Union would support the working classes in other countries throughout the world.

Under this doctrine of "democratic centralism" which compels members to submit without question to the Party's decisions and programs, there is no place in the Party for those who would oppose its program of forceful and violent overthrow of the Government (Ex. 19, R. 28).

PETITIONER'S ROLE AS A PARTY MEMBER AND LEADER IS CONCEDED

With respect to petitioner's membership in the Communist Party there is no issue, he having conceded this point in his opening statement to the jury (Tr. 273) and having acknowledged in his petition for a writ of certiorari that he is publicly known as Chairman of the Communist Party of North Carolina (Pet. 4).

EVIDENCE OF PETITIONER'S KNOWLEDGE OF THE PARTY'S REVOLUTIONARY TEACHINGS AND PURPOSES AND OF HIS INTENT TO ACCOMPLISH THEM AS SPEEDILY AS CIRCUMSTANCES PERMITTED

To establish that petitioner, while a member and officer of the Communist Party, had knowledge that the organization teaches and advocates the overthrow of the Government as speedily as circumstances would permit, and that he had the specific intent to bring about such overthrow, the Government offered extensive evidence. Such evidence established that petitioner maintained close contact with National Party Headquarters in New York (Tr. 690, 1053, R. 69, 92–93); he organized meetings at which high Party functionaries spoke (Tr. 585–588, 613, 670); he received the plaudits of William Z. Foster, National Chairman of the Party, for his work in the Party's behalf in North and South Carolina (Tr. 669–670); he was the Director of a Party school to train outstanding Communists in the Virginia, North and South Carolina Party Districts (R. 71); and he disappeared into the Party underground in December 1951 (R. 56). The evidence is clear, in short, that petitioner was not a minor figure in the Party hierarchy but rather a highly-trained, well-disciplined, articulate teacher of Marxism-Leninism occupying a position of leadership.

The witness Lautner explained that the Communist Party of the United States is divided into Districts, some of which comprise more than one state (R. 27). Petitioner was Chairman of the Communist Party of North Carolina, a state organization of the Party

(R. 95). In each state organization or District, various departments or commissions are set up to permit efficient functioning (R. 27), and it is the duty and responsibility of the State Chairman (in North Carolina, the petitioner) to supervise and guide the activities of these various departments—such as the Educational Committee, Literature Director, Nationality Groups Commission, and so forth (R. 27–28). Under the Party's principle of "iron discipline," it was petitioner's function as State Chairman to implement and carry out in his State the decisions and program as laid down by the National Committee of the Party.[7]

The evidence also showed that petitioner was completely familiar with substantially all of the basic Marxist-Leninist classics, which were introduced by the Government to show the revolutionary purposes of the Communist Party. Specifically, his direct knowledge of the following texts was demonstrated:

> *Communist Manifesto* (Ex. 1, Tr. 664); ***Foundations of Leninism*** (Ex. 5, R. 44); *Problems of Leninism* (Ex. 6, Tr. 1034); *State and Revolution* (Ex. 7, R. 36, Tr. 1055, 1058); *Left Wing Communism* (Ex. 8, Tr. 1017, 1020, 1127); *Imperialism* (Ex. 10, Tr. 1055, 1057); *History of the Communist Party of the Soviet Union (Bolshevik)* (Ex. 12, Tr. 664–665); *Strategy and Tactics of the Proletarian Revolution* (Ex. 13, Tr. 1021).

In addition to evidence of his familiarity with these "classics" of Marxism-Leninism, there was a variety of direct evidence, consisting of petitioner's own state-

[7] It will be recalled that the defendants in the *Dennis* case were members of the National Committee of the Party.

ments, to show his knowledge of the Party's violent revolutionary purposes.

Petitioner's endorsement of the Communist Party's revolutionary program, as well as his recruiting activity, was demonstrated in his tutoring of the witness Clontz in an effort to mold him into a valuable, well-indoctrinated member of the Party. In 1948 Clontz was a law student at Duke University (R. 32). After a conference with an agent of the Federal Bureau of Investigation, Clontz sent a postcard to petitioner in September 1948 expressing an interest in Communism (R. 31–32).

In response to the postcard, Clontz received from petitioner a carton of Communist literature and a letter advising:

> * * * If I can discuss any matter relating to my party and its program with you in person, I will be glad to do so [R. 32–33].

Petitioner promptly commenced to implement this program by furnishing Clontz with copies of *Problems of Leninism* and *State and Revolution* (Exs. 26 and 25; R. 36), both of which delineate the basic aims and objectives of the Party (Tr. 581–583), and advising him to study them in order "to learn more about his Communist Party and to learn the principles of * * * Marxism-Leninism" (R. 37).

Referring to a meeting held with petitioner just before Christmas of 1948, Clontz testified (R. 35):

> [T]hen I posed to Scales the question, * * * if Communism is the better form of government and the better way of life, why can't we bring Communism here to the United States by

educating the people, by showing them that this is the best form of government?

Scales answered me that that was entirely fallacious, that that would never work, that in the first place the Government of the United States owned all the media of communication, the newspapers, * * * they controlled the schools, the other institutions of government and that they would not permit the masses of people to learn the truth about this Communism, that in order to get the truth to the people you would first have to destroy the government and destroy the mediums of communication, control and destroy the institutions of Government, that Stalin and his followers had proved conclusively that ideas alone would never change the form of government or would never do anything. He said that it would be nice if revolution happened automatically but, he said that unfortunately they didn't, that a small militant force had to bring about a change in government by revolution.

I recall he said that that is where we, the Communist Party, come in. He said that Engels, the philosopher of some kind, that collaborated with Karl Marx, had felt that when the revolution comes about, Government would just disintegrate and the people would just sort of run things very loosely. He said that Lenin had proved that that didn't follow, that when the revolution took place in the Soviet Union in Russia, that Lenin had taken the police power, that the Czar had used that police power to consolidate his position and as Junius put it, to protect the masses of the people from the encroachment of the foreign capitalist coun-

tries that would try to come in and prevent the revolution.

Scales said, and it made quite an impression on me, that force is the only answer, that ideas alone can never accomplish anything.

At subsequent meetings with Clontz during 1949, petitioner continued to supply him with Communist literature (R. 37), and, in giving him an autographed copy of William Z. Foster's *Twilight of World Capitalism*, pointed out that in the dedication Foster had said "his great grandson * * * would live in a Communist United States of America" (R. 37).

On numerous occasions during this period, petitioner discussed with Clontz the basic strategy of the Party for bringing about a violent revolution (R. 38–39), describing the forces that would be utilized as follows:

> * * * that the Communist Party was the natural leader of the working class, and that the Communist Party must lead the unions in their efforts. He said the big difference in the Communist Party and a union is that a union just saw the next hill, whereas the Communist Party knew the over-all goal which was a Communist United States, and, therefore, had more foresight and could direct activities more, so there was a definite program of * * * participation in union affairs by the Communist Party.
>
> The second force that he said they would use was that of the Negro nation. Now Communists defined the Negroes in the South, what they call the black belt, as a separate nation all their own * * * that there was the eternal

> struggle between the working class and the Negroes and the blood-sucking capitalist, monopolist. He said that they were oppressing the Negro people in the South and all over the United States and that the Communist Party was going to use these two forces to bring about the revolution guided by the Communist Party as the vanguard.

Petitioner later predicted to Clontz when the revolution would take place (R. 41):

> He commented that in July of 1917, the Czar had driven the Communist Party of Russia underground and had outlawed them. He said that the very next October the Communist Party, the Bolsheviks, had managed to bring about the revolution. Scales said he saw a perfect analogy here in this country. He said that as soon as the capitalists drive us underground, there will be a revolution. He said that if a depression came along that would accelerate it still further and would make the job easier.

In January 1950, Clontz was directed by petitioner to attend a meeting of the Karl Marx Study Club, a student organization run by Communists at the University of North Carolina to hear an address by Herbert Aptheker, a high Party functionary, whom petitioner had arranged to bring down from New York (Tr. 613). Aptheker told the group that "a revolution in the United States was a certainty, and a necessity" and would be modeled on the "revolution that took place in Russia" (R. 42). Discussing this meeting with Clontz a few days later, petitioner stated

that Aptheker's speech was "one of the clearest statements of Marxist teachings that we would find" (R. 42).

On January 17, 1950, Clontz was officially received into the Communist Party by petitioner as a secret member at large for security reasons (Ex. 29; R. 43). Petitioner advised Clontz that he would continue to tutor him personally in the principles of Communism to help him "be a better member of the Communist Party" He instructed Clontz to continue in his studies of Marx and Lenin and gave him a study outline based on the book *Foundations of Leninism*[8] (Ex. 5), which he said he personally had prepared (Ex. 30; R. 44). Petitioner told Clontz to use the outline he had prepared as a guide to help him in his study of *Foundations of Leninism* (R. 44). Among the questions contained in this outline are the following:

> 3. Stalin outlined the "Three Theses of the Proletarian Revolution" twenty-five years ago. Does it sound as true now as it did then? How?
>
> 4. How does a bourgeois-democratic revolution become a socialist revolution?
>
> 5. What conditions have to exist in a country before there can be a successful revolution?

In subsequent discussions he had with Clontz, petitioner spelled out the answers to these questions (R. 48–51). In February or March 1950, after petitioner and Clontz had read a passage from Stalin's *Problems*

[8] On a later occasion, petitioner told Clontz that *Foundations of Leninism* (Ex. 5) was "the text and 'Bible' for living and fighting for present day Communists" (R. 48).

of Leninism,[9] petitioner pointed out to Clontz that this passage "showed the inevitability of the revolution, that obviously you could not effect a change in government without a violent revolution" (R. 49). Scales then reiterated his feelings that "a revolution would come in this country much more easily than it had in the Soviet Union" (*ibid.*).

On another occasion during the Spring of 1950, Clontz testified, Scales "brought up the question of permanent revolution. Permanent revolution was defined by Scales as the concept that the Soviet Union and the Communist Party in the Soviet Union were not through with their job after they had achieved Socialism. In the Soviet Union they had continuing obligations. He said that when the Soviet Union's Communist Party had brought about a revolution * * * they were still obligated under Stalin's teachings and under common sense * * * to continue assisting the Communist Party all over the world until they had overthrown the capitalist governments, including that of the United States, that would threaten Communists, Communism and Socialism, unless they were overthrown" (R. 49–50). Clontz then asked petitioner whether this meant that when the day of revolution comes, the Soviet Union would land troops. Peti-

[9] "Can such a radical transformation of the old Bourgeois order be achieved without a violent revolution, without the dictatorship of the Proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of the Bourgeois democracy which is adapted to the rule of the Bourgeoisie, means that one has either gone out of one's mind and lost the normal human understanding, or, has grossly and openly repudiated the Proletarian revolution." *Problems of Leninism*, J. Stalin, p. 131 (Ex. 26; R. 49).

tioner replied that "as a practical matter * * * the Soviet Union would not land troops at the commencement of the revolution, that the Communists here would have to start the revolution themselves" (R. 50).

In June 1950, petitioner made arrangements for Clontz to attend the Jefferson School of Social Science which he described "as a school sponsored by the Communist Party in New York for Party members from all over the country * * * that were deemed to be good potential Party material" (R. 51). Clontz was also told that petitioner would have to certify him as a good Communist before his application was acted on and that he would have to adopt an alias (R. 51).[10] On August 5, 1950, Clontz left for New York to begin his courses, which lasted approximately three weeks (R. 52). The third week was spent in private tutoring by Doxey Wilkerson, the Director of Curriculum, whose job was to see that the teachings of the Jefferson School reflected the Communist Party line as laid down by the Party in the National Headquarters (R. 53; Tr. 662–663). Among the texts used in this course were the *Communist Manifesto* (Ex. 1; Tr. 664) and *History of the Communist Party of the Soviet Union* (Ex. 12; Tr. 663–664). On his return from New York, Clontz discussed in detail the teachings of the Jefferson School with petitioner and Henry Farash, the Party Organizer in the North Carolina District (Tr. 661, 668). At the same time, petitioner and Farash discussed Clontz's future Party assignments with him and it was decided, since maximum se-

[10] Clontz used the name Ralph Clayton while attending this school (R. 52).

curity had been ordered in effect by the National Communist Party Headquarters (Tr. 666), that Clontz would remain as a secret Party member and would study and "assist them in their Front activities and otherwise prepare myself for duty when the revolution came" (Tr. 667).[11]

In the latter part of 1951, petitioner found it necessary to curtail his open Party activities, advising Clontz that he was going underground (R. 56),[12] but he remained Chairman of the Carolina District of the Communist Party up to and through his trial and conviction.

While Clontz ceased his contact with petitioner in December, 1951, the witness Childs continued his association with him until late in the summer of 1953 (R. 94). In the summer of 1952, when Childs told petitioner that he was planning to quit his job and return to school, petitioner explained that the Communist Party program during this period was industrial concentration and that it was Childs' duty as a Communist Party member to remain in industry since the Party considered the trade unions to be "schools of the revolution" (Tr. 1062).[13] On this same

[11] At this meeting petitioner displayed a letter he had received from William Z. Foster, National Communist Party Chairman, congratulating him on his work in the Carolinas, particularly on the 1950 Communist Party Convention (Tr. 669–670).

[12] Petitioner told Clontz that "the Party was like an iceberg * * * a very small amount left visible on top and a vast underground network underneath" (R. 55).

[13] "We must * * * agree to any sacrifice, and even—if need be—to resort to all sorts of stratagems, artifices, illegal methods, to evasions and subterfuges, only so as to get into the trade unions, to remain in them, and to carry on Communist work within them at all costs." Lenin, *Left Wing Communism*, p. 38 (Ex. 8).

occasion, petitioner told Childs that if Party members left industry and went back to school then they "would have to sit back and wait for the Red Army to liberate them" (R. 67).

In August 1952, Childs was selected by petitioner to attend a school set up by him "to give special training to outstanding Communist Party people in Virginia, North and South Carolina Districts" (R. 67, 71). This school was held under strict security precautions in a remote wooded area adjoining the farm of a Party member in Walnut Cove (R. 67–70). Childs was instructed by petitioner to bring with him copies of *History of the Communist Party of the Soviet Union* (Ex. 12) and *Ten Classics of Marxism* (Ex. 41).[14] The students were assigned readings in the Marxist-Leninist "classics" which were later discussed by the group (Tr. 1078, *et seq.*). On one occasion the group discussed suggestions on how to "Bolshevize" the Communist Party (R. 85). On this subject the proposition was stressed that the works of Marx, Lenin and Stalin are the basic theory on which all decisions in the Party are made (R. 86), and that members should engage in self-study of the classical works of Marx, Lenin and Stalin to develop an understanding of the relationship between the theory of the Communist Party which was studied and its application in their personal work (R. 88). Illustrative of this, it was pointed out to the students that although the Party line for public consumption—*e. g.*,

[14] *Ten Classics of Marxism* is a compilation of Party texts including the following: *Communist Manifesto* (Ex. 1); *Foundations of Leninism* (Ex. 5); *State and Revolution* (Ex. 7); *Left Wing Communism* (Ex. 8); *Imperialism* (Ex. 10).

belief in peace—may change as the situation demands, the ultimate goal of the Party as embodied in the works of Marx, Lenin and Stalin always remains the overthrow of the Government by force and violence (R. 87–88).

A highlight of this school was a demonstration in petitioner's presence by the Communist Party's District Organizer for the State of Virginia—a member of the school staff, along with petitioner—in which he explained to the students that if it became necessary to kill a man in a picket line, this could be accomplished by the use of a wooden pencil which could be thrust through the individual's chest or throat (R. 93–94).

Petitioner's own views on the subject of violence were again expressed in his comment to Childs, on an occasion when Childs showed him a book distributed by the Western Electric Company entitled *Our Own Communists Can Cripple Us*, that "we should keep the names of these people and shoot them some day" (R. 67).

Petitioner, in April 1953, explained at a Party meeting attended by Childs that "the purpose of the Communist Party Club was not only for the Bourgeois democratic revolution, but was for the ultimate Socialist revolution" (R. 94).[15]

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[15] In *Problems of Leninism* (Ex. 26), which petitioner recommended to Childs (R. 94), Stalin points out (pp. 11–17) that the main difference between "Bourgeois democratic revolution" and "Socialist revolution" is that the proletarian (Socialist) revolution cannot avoid destroying the old state machine and replacing it by a new one.

Both the witnesses Clontz and Childs testified that during the period of their association with petitioner and while they were members of the Communist Party, the principles taught them by petitioner as the basic aims and objectives of the Communist Party were never changed or repudiated (R. 56–57, 95).

SUMMARY OF ARGUMENT

I

The membership clause of the Smith Act is valid on its face and as applied in this case.

A. *Dennis* v. *United States,* 341 U. S. 494, substantially answers the argument that the membership provision is unconstitutional on its face. Here, as in *Dennis*, the evil with which Congress dealt is not mere speech—discussion and intellectual attempts to persuade—but action in concert with "a group aiming at [the Government's] *overthrow*" by "attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit * * *." 341 U. S. at 509 (emphasis added). As in *Dennis,* the problem is actually one of preparation by the Party to overthrow the Government by force "when they thought the time was ripe." *Id.* at 510.

The familiar history which was before the Court there—and see Mr. Justice Jackson's concurring opinion in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 422 *et seq.*—gave solid ground for the judgment of Congress in 1940 that Communist, Nazi, and Fascist organizations were dedicated to principles of force and violence. The years since 1940 have con-

firmed that judgment. The experience of countries like Czechoslovakia and Poland has tragically demonstrated how minority groups like these, by tactics of infiltration and with the aid of their foreign alliances, can destroy free institutions with a coup when the time is ripe. There has been powerful evidence of Communist Party espionage in this and other countries on behalf of a foreign power. And this threat has been seen to be potent and grave in a time when the constant possibility of lightning war calls for daily vigilance against national disaster, including the wreckage which could be effected by even a small group which seeks to occupy strategic places and which pledges its loyalty to a potential enemy. These harsh realities, sustaining the portion of the Smith Act involved in *Dennis*, equally sustain the portion involved here. For although the charge in *Dennis* was "conspiracy" and the charge here is membership, the danger and the power of Congress to meet it are essentially the same.

1. Like the provisions involved in *Dennis*, the membership clause does not expressly state the element of intent required for conviction. As in *Dennis*, however, it is none the less true "that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." 341 U. S. at 499. In *Dennis*, this conclusion followed from the familiar principles that (1) the task of judicial construction is to save, not to destroy, and (2) "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-Amer-

ican criminal jurisprudence." *Id.* at 500. These principles apply here. There is no merit in petitioner's claim that the Court should refuse to hold intent to be an element of the crime and thereby create a constitutional difficulty.

2. In his effort to show a constitutional difference between the "conspiracy" problem in *Dennis* and the "membership" problem here, petitioner would have membership in the Communist Party or similar totalitarian organizations viewed as a merely passive status, devoid of any action or concert with others. But we deal here with membership in a rigidly indoctrinated and severely disciplined group dedicated to the violent overthrow of the Government—membership coupled with knowledge of the group's purposes and intent to achieve them. As the Court recognized in *Dennis* (p. 511), "rigidly disciplined members subject to call when the leaders" find the time has come comprise the obviously essential sinews of the threat against which the Smith Act is directed. Dealing with such knowing members who aim for the Party's unlawful goals, the membership clause neither covers nor threatens passive dupes or innocents who lack the requisite knowledge or intent.

The rule of the *Dennis* case does not rest, of course, on some special constitutional principle confined to crimes technically designated as "conspiracies." And the fact is that, at least so far as the Constitution is concerned, the combination denounced by the membership clause "partakes of the nature of a criminal conspiracy." *Whitney* v. *California*, 274 U. S. 357,

371–372; see *American Communications Assn.* v. *Douds, supra,* at 432 (Mr. Justice Jackson, concurring). Even the important concurring opinion of Justices Brandeis and Holmes in *Whitney* shows that such a statute is not void on its face.

3. The same reasoning disposes of the claim that the membership clause imposes "guilt by association" and is therefore void. The crime punished is not mere "association." It consists in the individual's personal participation in a combination aimed at forceful revolution with knowledge of this end and intent to reach it. The liability is personal, not vicarious. It is for conduct, not mere status. It stands on the same constitutional footing as the conduct held punishable in *Dennis.*

B. If, as we believe, petitioner fails to show that the membership provision should be held void on its face, he certainly fails to show its invalidity as applied to him. It was proved overwhelmingly that the Communist Party teaches and advocates overthrow of the Government by force and violence, that petitioner knew this, and that he personally intended the accomplishment of that objective. Petitioner was shown to be a Party leader in a significant area, teaching and advocating its doctrines and working for their implementation. The fact that he alone could not overthrow the Government does not immunize him. The same was true of the *Dennis* defendants at the time they were convicted. The Party exists and acts only through its leaders and members who will act when the time is ripe. Congress could strike

at the danger the Party poses in the only way it could be reached—through these leaders and members.

II

Section 4 (f) of the Internal Security Act provides that membership in a Communist organization shall not constitute "per se" a violation of any criminal statute. But this does not afford the immunity petitioner claims from prosecution under the Smith Act. He was not indicted or convicted for membership "per se" but for membership coupled with knowledge of the Party's purposes and intent to achieve them.

Failing to find the asserted exemption in the statutory language, petitioner fails equally when he seeks it in what he describes as "logic and legislative history" (Pet. Br. 32). The history only confirms that Congress exempted "membership * * * per se" and nothing more. Indeed, the history shows that Congress was particularly concerned with the Communist Party and in no mood to grant its members any immunity beyond that deemed absolutely necessary for purposes of the Internal Security Act. It fully satisfies the asserted demands of logic to conclude that Congress did only what the language it wrote says—that it exempted only "membership * * * per se." Sections 4 (a) and 4 (c) of the Internal Security Act—covered like the Smith Act, by this exemption—are similarly not aimed at membership per se. In each instance, the exemption functions perfectly well as an aid to interpretation, making certain that mere membership without more is not to be declared criminal.

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III

The evidence sustains the verdict.

A. Every court and jury which has considered the question under the Smith Act has concluded that the Communist Party teaches and advocates the overthrow of the Government by force and violence. Closely similar to the evidence in prior cases, the evidence here fully justified the jury and the two courts below in reaching the same conclusion.

B. The evidence was equally clear and sufficient to prove petitioner's unlawful knowledge and intent. Petitioner acknowledges that he was the Party leader in the Carolinas. This alone goes a long way to prove his knowledge of what the Party was about. In addition, however, there was extensive evidence specifically detailing petitioner's own acts and declarations. These revealed clearly his knowledge and endorsement of the Party's objectives.

The same evidence plainly authorized, if it did not compel, the jury's determination that petitioner personally intended the realization of these objectives. He led the Party in the Carolinas; he taught its doctrines and recruited members; he worked openly and then underground in the Party's cause. It is possibly imaginable that a person could bend all his efforts this way toward a specific goal without intending to reach it. But the jury was certainly free to conclude beyond a reasonable doubt that no such hypothetical divergence between conduct and intent existed here.

IV

A. Petitioner's motion attacking the indictment because of the composition of the grand jury was properly rejected because (1) it came much too late and (2) it was insufficient on its merits.

1. Such a motion must be made before the plea is entered or "within a reasonable time thereafter" when allowed by the trial judge. Failure to present the motion within the prescribed time constitutes a waiver. Rule 12, F. R. Crim. P. Petitioner was given extensions totaling 64 days after his plea in which to present his numerous pre-trial motions. The motion here in question was not made until more than two weeks after the expiration of these ample extensions. There was no suggestion of a reason, and there is none now, for the delay. These circumstances fully warranted the decision that the motion must be denied as untimely.

2. In any event, petitioner's attack on the grand jury which indicted him presents no basis for reversal. Petitioner is mistaken when he claims that 28 U. S. C. 1864 was violated in that the Jury Commission could not have known that there were 300 names of qualified persons in the box when the panel here involved was drawn. The testimony on this issue showed that there were about 500 names in the box; that the Deputy Clerk knew personally the background and status of practically all persons whose names were in the box; and that the group constituted a fair cross-section of the community drawn without prejudice or discrimination. The fact that names of prospective jurors were solicited from community leaders and organiza-

tions does not vitiate the Jury Commission's action or the indictment. This was not a case like *Glasser* v. *United States*, 315 U. S. 60, where the defect was solicitation of names from a single organization and a consequently improper weighting of the list. See *Dow* v. *Carnegie-Illinois Steel Corporation*, 224 F. 2d 414, 427 (C. A. 3); *United States* v. *Dennis*, 183 F. 2d 201, 218 (C. A. 2), affirmed, 341 U. S. 494.

It should be noted, finally, that the method of selection in the district here involved has been changed so as to correct the asserted deficiencies of which petitioner complains. This fact, coupled with the tardiness of the objection and the utter absence of prejudice, makes this a singularly inappropriate case for invoking the supervisory powers of this Court.

B. Evidence petitioner attacks as inadmissible was relevant and otherwise competent. Evidence of the Party's teachings on the so-called "Negro question" and the Korean conflict helped to piece out the patterns of the Party's unlawful doctrines. The evidence of a demonstration at a Party school showing a technique for murder on a picket line related directly to petitioner, who conducted the school and was present during this incident.

Petitioner is on equally weak ground when he complains that the testimony of the witnesses Lautner and Clontz included references to acts and declarations of others when petitioner was not present. The evidence in question all bore on the Communist Party's teachings, a material issue in the case. Lautner testified as an expert on Party doctrine, a subject on which he was well qualified by a long career as a

Party leader. Clontz, a disciple of the petitioner, told of teachings at Party schools to which petitioner sent him and of other items of doctrine discussed with and explained by petitioner. The material question of what the Party stood for could only be explored in this way—by showing what the leaders and members said and did.

C. Two of the witnesses, Clontz and Childs, had made written reports to the F. B. I. concerning the matters to which they testified. Though petitioner laid no foundation for a belief that there was any inconsistency between the reports and the trial testimony, the trial court, at petitioner's instance, inspected the reports for itself and sealed them as part of the record which is here. Finding no inconsistencies and no omissions, the court denied the motion by which petitioner's counsel sought inspection of the reports for himself. The governing principles are reviewed in the Government's brief in *Jencks* v. *United States,* No. 23, this Term, Point I. As we show there, the production of documents is a matter as to which a "large discretion must be allowed the trial judge * * *." *Goldman* v. *United States,* 316 U. S. 129, 132. Petitioner was probably given more than he could demand as of right when the trial judge examined the reports despite the failure of petitioner to lay any foundation therefor. There was certainly no abuse of discretion in rejecting the demand for inspection by petitioner himself.

D. Petitioner argues, finally, that he must be presumed to have been denied a fair trial because Congress, in the Internal Security Act of 1950 and the

Communist Control Act of 1954, made findings that the Communist Party aims at violent overthrow of the Government. Because of these legislative findings, it is said, the jury must necessarily be deemed to have been incapable of following the instructions which required that it determine the nature of the Communist Party for itself.

Apart from the fact that the argument is improperly made for the first time in this Court, it lacks merit. There was no evidence of the bias petitioner would have the Court presume as a matter of law. It was not shown either that the jurors actually knew of the legislative findings in question or were influenced by them if they did. Petitioner's theory would invalidate every conviction under the Smith Act. But the theory, which attacks the verdict on premises inconsistent with the jury system itself, is unacceptable. The suggested possibility of bias could certainly have been explored; it is not a matter to be presumed without proof. Compare *Accardi* v. *Shaughnessy*, 347 U. S. 260, with *Shaughnessy* v. *Accardi*, 349 U. S. 280.

ARGUMENT

I

THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THE FACTS OF THIS CASE

We recognize, with the petitioner (Pet. Br. 13), that constitutional issues are to be reached last, not first. However, petitioner begins his argument with the Constitution, and we accept his arrangement of points for the convenience of the Court and the parties. We sub-

mit that this case and the companion *Lightfoot* case (No. 32) are substantially controlled on the constitutional issues by *Dennis* v. *United States*, 341 U. S. 494, and that petitioners have necessarily failed in their effort to show that, while Congress could punish conspiracy to organize the Communist apparatus, it was powerless to proscribe knowing, purposive, active—and, here, high-level—membership from which alone the apparatus derives its power to work for violent revolution.

A. *Validity of the clause on its face*

Reviewed at length in *Dennis*, and long familiar to the Court in any event (see, *e. g.*, Mr. Justice Jackson's opinion in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 422 *et seq.*), the extensive knowledge of totalitarian threats on which Congress has acted scarcely requires lengthy rehearsal here. As the Court knows and everyone knows, it was clear by 1940, when Congress wrote the Smith Act, that the Communist, Nazi, and Fascist movements, armed with modern techniques of subversion and infiltration, posed grave threats to democratic governments the world over. To focus only on the Communist Party, which is involved here, Congress had before it voluminous evidence that the Party's members had at least divided loyalties,[16] and that the Party was under the firm, direct control of the Communist Interna-

[16] See for example the testimony of William Z. Foster, Chairman of the Communist Party of the United States before the House of Representatives Special Committee To Investigate Communist Activities in the United States, 1930–1931, in which Foster stated that the "more advanced workers" in this

tional, and, through it, of the Soviet Union." From the testimony of Earl Browder and Benjamin Gitlow and from a great mass of documentary evidence, Congress could reasonably conclude that both the Communist International and the Communist Party of the United States were devoted jointly to a program of establishing socialism through the medium of violent revolution."

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country look upon the Soviet Union as "their country" (Hearings, Part I, Volume 4, pp. 384, 385).

The evidence in this case makes it clear that this situation was not limited to the 1920's and 1930's. In about 1949 petitioner told the witness Clontz that, although there was no visible tie between Communist Parties of the various countries, the Soviet Union was regarded by Communist Party members as the "mother country" and that "the Soviet Union controlled generally the policies handed down by the Communist Party here" (R. 39).

[17] Hearings before House Committee on Un-American Activities on H. Res. 282, 76th Congress, 1st Sess., pp. 4308–4311, 4432, 4671.

[18] See, *e. g.*, the statement of Representative McCormack of Massachusetts:

"* * * We all know that the Communist movement has as its ultimate objective the overthrow of government by force and violence or by any means, legal or illegal, or a combination of both. That testimony was indisputably produced before the special committee of which I was chairman, and came from the lips not of those who gave hearsay testimony, but of the actual records of the Communist Party of the United States, presented to our committee by the executive secretary of the Communist Party and the leader of the Communist Party in the United States, Earl Browder. That was the testimony, the best evidence presented to our committee at that time, that such is the objective of the Communist Party. Therefore, a Communist is one who intends knowingly or willfully to participate in any actions, legal or illegal, or a combination of both, that will bring about the ultimate overthrow of our Government. He is the one we are aiming at, and the Government should have the

Events following 1940, both prior to and since the *Dennis* decision, have served to make the Communist threat clearer and more serious and to confirm the judgment on which Congress proceeded in the Smith Act. Immediately following the collapse of Nazi Germany, Soviet troops occupied Poland, Czechoslovakia, Hungary, Bulgaria and Rumania. In each of these countries new governments were established consisting of a coalition of parties, and in each of these countries the Communists were a minority party. In each case the Communists secured control of the Ministry of the Interior—control of the police—and gradually assumed power through the oppressive use of the police and pressure exerted by the Soviet Union.[19]

Recent history demonstrates also that the Communist Parties in various countries have provided an extensive network of espionage on behalf of the Soviet Union. Canada discovered the existence of a Soviet espionage ring in 1946,[20] Australia in 1954, when

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burden of proving that a person 'knowingly or wilfully' advocates the overthrow of government and is 'knowingly or wilfully' a member of an organization that believes in the ultimate overthrow of our Government." [84 Cong. Rec. 10454.]

[19] Poland—15 State Dept. Bull. 422; 16 State Dept. Bull. 299.

Rumania—15 State Dept. Bull. 1057; 17 State Dept. Bull. 38, 329, 995; 18 State Dept. Bull. 216; 20 State Dept. Bull. 450, 692, 755.

Hungary—16 State Dept. Bull. 495, 583, 1215; 17 State Dept. Bull. 392, 411; 20 State Dept. Bull. 450, 556, 692, 697, 755.

Bulgaria—16 State Dept. Bull. 1218; 17 State Dept. Bull. 429, 481, 531, 702; 19 State Dept. Bull. 447, 710; 20 State Dept. Bull. 450, 556, 692, 755.

Czechoslovakia—18 State Dept. Bull. 304, 446, 536.

[20] *Report of the Canadian Royal Commission*, which was issued after a thorough investigation by a commission of two Canadian Supreme Court Justices.

Vladimir Mikhailovich Petrov left the service of the Soviet Union and was granted political asylum in Australia."[31] That a similar network of espionage has existed in the United States and elsewhere seems unquestionable from the testimony of such persons as Whittaker Chambers[32] and Elizabeth Bentley,[33] from the case of Klaus Fuchs in England,[34] and from the *Rosenberg* espionage trial in this country.

In a word, contemporary history compellingly supports the opinion of Mr. Justice Jackson in *American Communications Assn.* v. *Douds*, 339 U. S. at 425, when he said:

> The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. * * * Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. It would be incredible naivete to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power. In not one of the countries it now dominates was the Communist Party chosen by a free or contestible election; in not one can it be evicted by any election. The international police state has crept over Eastern Europe by deception, coercion,

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[31] *Report of the Royal Commission on Espionage* of the Commonwealth of Australia, published in 1955.

[32] Hearings before the House Committee on Un-American Activities Regarding Communist Espionage in the United States Government (1948), pp. 1429–1449.

[33] Hearings, *supra* fn. 22, pp. 503–562.

[34] The text of Fuchs' confession is partially reproduced in the New York Times for February 11, 1950, p. 2.

> coup d'etat, terrorism and assassination. Not only has it overpowered its critics and opponents, it has usually liquidated them. The American Communist Party has copied the organizational structure and its leaders have been schooled in the same technique and from the same tutors.

The familiar dangers with which Congress, in enacting the Smith Act, concerned itself become greatly magnified in times of grave national crises. The serious threat under which free nations of the world must live today is, through force of necessity, receiving more and more recognition. For the past two years, the Executive Branch of the Government has conducted nation-wide Civil Defense exercises to help insure the country's preparedness in the event of a hostile attack. On July 20 of this year the second Operation Alert was held.

Following a mock hydrogen bomb attack, the test was carried out on the assumption that planes had dropped bombs and submarines had fired guided missiles on targets consisting of sixty-three cities, nine air bases, and four Atomic Energy installations. In the New York City area alone it was assumed, for purposes of the test, that five imaginary one-megaton bombs were dropped, inflicting about six million casualties. Ten thousand key operating personnel were required to evacuate Government departments in Washington and travel to sixty-five relocation centers.[22]

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[22] *The New York Times*, July 20, 1956, p. 1, and July 21, 1956, p. 1.

It requires no lively imagination to comprehend the danger that would be presented to the national security in such a time of disaster by an organization consisting of thousands of highly disciplined, tightly organized adherents whose doctrines are ideologically attuned to the aggressor nation and who have been located in key positions for revolutionary purposes. And so the danger to which Congress and the Executive have found need to address themselves must be and has been appraised in terms of the lightning speed of modern warfare. Doctrines of infiltration into strategic places and readiness to aid a foreign power's assaults, familiar and central features of the Communist program, cannot be weighed on outmoded assumptions which consider only the threat of the Party by itself in a "normal" world. The threat is not the less real, large, or potentially disastrous for the fact that no one can predict for sure when or if the preparation will eventuate in a direct and violent assault on our security and institutions.

Recognizing the solid factual basis on which Congress acted (see, *e. g.*, 341 U. S. at 510–11), this Court, in *Dennis*, concluded (p. 516) "that §§ 2 (a) (1), 2 (a) (3) and 3 of the Smith Act do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights * * *." That conclusion and the premises on which it rests govern this case. To be sure, we are concerned here specifically with the membership provision whereas the convictions in *Dennis* were for conspiracy (1) to organize the Communist Party as a group of persons who teach and advocate overthrow of the Government by force and violence,

and (2) knowingly and willfully to advocate and teach the duty and necessity of such overthrow. 341 U. S. at 497. And so the petitioners here and in *Lightfoot* have undertaken to show that, though Congress could strike at the Communist conspiracy in its inception, it lacks power to reach the forged weapon by punishing those who constitute it when they become and remain members of the Party, knowing its purposes, intending their achievement as speedily as possible, and supplying in this way the force by which such achievement is sought. For this view, the petitioners in the two cases argue variously that (1) no requirement of personal intent may be found in the membership clause though such intent was found to be a requisite in the *Dennis* provisions, and this lack invalidates the statute (Scales Br. 17; Lightfoot Br. 45–48); (2) that there is a constitutional difference between the evil of the conspiracy in *Dennis* and the evil of the membership involved here, because the individual as a member lacks the strength and may lack the intent to overthrow the Government (Scales Br. 18–22); and (3) that the membership clause punishes mere association and imposes "guilt by association" (Scales Br. 25–26; Lightfoot Br. 48–54). These arguments, largely ignoring the factual realities which concerned Congress and are revealed in the records here, fail utterly to warrant the proposed constitutional distinction between these cases and *Dennis*.

1. As in the portions of the Act considered in *Dennis*, the membership clause does not state expressly the requirement of personal intent. In *Dennis*, fol-

lowing the familiar principle that judicial construction of statutes should save rather than destroy, it was held "that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." 341 U. S. at 499. It was recalled there that [t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 500. That ruling, with its salutary reasons, is squarely apposite here.

Directly contrary to this Court's reminder "that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution" (*Dennis*, 341 U. S. at 501), the petitioners here insist that, in contrast to *Dennis*, "intent should not be read by implication" (Scales Br. 17; Lightfoot Br. 48) into the membership clause. The effort, we think, has been sufficiently refuted. The principles of constitutional adjudication and criminal jurisprudence which required intent as an element in *Dennis* require it no less here. It is no answer to suggest, in a perverse insistence on finding constitutional infirmities, that conspiring to organize the Party and teach and advocate its unlawful objectives (*Dennis*) necessarily entails intent to achieve these objectives, while membership in the Party does not (Scales Br. 22; Lightfoot Br. 47). At most, the suggestion could mean that in imaginable cases, not the ones here, membership might be proved without showing the requisite intent. It by no means follows that the courts should strain after con-

stitutional difficulty by rejecting the natural conclusion that intent is an element of the crime the statute denounces.

2. Pervading the constitutional arguments of Scales, and reiterated by Lightfoot (Br. 45), is the premise that membership in the organizations against which the Smith Act is directed—with knowledge of their purposes and intent to achieve them—is a merely passive status, connoting neither actions nor declarations, amounting only to a harmless and constitutionally protected form of peaceful assembly. *Dennis* was different, the argument runs, because the crime there was a "conspiracy" and conspiracy—being active and "at work"—stands on a wholly different constitutional footing from "membership." The argument could stand only if "membership" and "conspiracy" were no more than lifeless abstractions and isolated dictionary terms, divorced from their context in the Smith Act and from the evils to which the Act is directed.

The fact is, however, that the "membership" against which this statute is directed is not passive membership in a literary society but (1) active membership in an organization teaching or advocating the government's violent overthrow, (2) with knowledge of the organization's purpose and (3) a personal intent to accomplish that purpose. The familiar teachings of recent history, reflected in this case and so many others, show that the membership in question, unlike membership in a club or political party, entails rigidly disciplined adherence to and labors for the organization's unlawful objectives. Thus, in rejecting the con-

stitutional attacks presented in *Dennis*, this Court noted as an essential and integral element of the "highly organized conspiracy" its "rigidly disciplined members subject to call when the leaders * * * felt that the time had come for action * * *." 341 U. S. at 511. Similarly, Mr. Justice Jackson wrote in *American Communications Assn.* v. *Douds*, 339 U. S. 382, under the topic heading, *"Every member of the Communist Party is an agent to execute the Communist program"* (p. 431), that (p. 432):

> Membership in the Communist Party is totally different [from membership in lawful political parties]. The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. * * * Moreover, each pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute "cells" in the factory, the office, the political society, or the labor union. For any deviation from the party line they are purged and excluded.
>
> Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume such obligations are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party's program.

It was against membership of this now familiar kind that Congress directed the Smith Act. Expressing the frequently reiterated understanding of the Con-

gress, Congressman McCormack said during the consideration of the Smith Act (84 Cong., Rec. 10454):

> • • • A Communist is one who "knowingly or willfully" is committed to a movement which has as its objective the ultimate overthrow of government by any means, legal or illegal, or a combination of both. We all know that the Communist movement has as its ultimate objective the overthrow of government by force and violence or by any means, legal or illegal, or a combination of both. That testimony was indisputably produced before the special committee of which I was chairman, and came from the lips not of those who gave hearsay testimony, but of the actual official records of the Communist Party of the United States, presented to our committee by the executive secretary of the Communist Party and the leader of the Communist Party in the United States, Earl Browder. That was the testimony, the best evidence presented to our committee at that time, that such is the objective of the Communist Party.

Against the background of the realities with which Congress was concerned in the Smith Act there is no meaningful place for the suggestion that the membership clause must be held invalid on its face because, read only as an arid collocation of words without a context, it *could* reach the "passive member who attends no meetings and engages in no advocacy or organizational activity of any kind" (Lightfoot Br. 45). Certainly, there has been no effort to prosecute such an individual in the cases before the Court or in any other. This is clearly not such a case. And the hypo-

thetical possibility "is particularly nonpersuasive when presented by petitioners, who, the [juries] found, intended to overthrow the Government as speedily as circumstances would permit." *Dennis*, at 515. In any event, the possibility is in fact only imaginary when it is considered in the light of what Congress justifiably believed and sought to guard against when it wrote the Smith Act. Sensibly read, the language negatives any basis for fearing that the innocent or the duped may be ensnared.* It is directed only at those who, with full knowledge of the organization's unlawful purposes, lend it their "aid and encouragement" and add to its strength by their active membership, thereby making themselves "party

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* The situation is thus very different from that which existed in *DeJonge* v. *Oregon*, 299 U. S. 353, where the indictment was brought under an Oregon statute making it a crime "to preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism." Since it was held that the statute was so broad in its scope that it could reach individuals who were not themselves members of the Communist Party or familiar with its purposes, the Court found the statute unconstitutional on its face with the observation (p. 362) that "peaceful assembly for lawful discussion cannot be made a crime."

Similarly unhelpful to petitioner is *Herndon* v. *Lowry*, 301 U. S. 242, where, reversing a state conviction for an attempt to incite to insurrection by violence, decision here went "on the ground that the Fourteenth Amendment prohibited conviction where on the evidence a jury could not reasonably infer that the defendant had violated the statute the State sought to apply." *Dennis*, at 538 (Frankfurter, J., concurring). There, though the defendant had solicited members for the Communist Party, the defect was a lack of proof "that he had urged or even approved those of the Party's aims which were unlawful." *Ibid.*

to the unlawful enterprise in which it is engaged." *Frankfeld* v. *United States*, 198 F. 2d 679, 684 (C. A. 4), certiorari denied, 344 U. S. 922.

It seems clear, then, that the applicability of the *Dennis* ruling is not to be escaped by the effort to assign to the "conspiracy" there a constitutional significance thought to disappear wholly from the tightly interrelated "membership" now before the Court. We submit, on the contrary, that if, as *Dennis* establishes, Congress can proscribe the teaching and advocacy of violent overthrow of the Government and can proscribe the organizing of a group for such purpose, it can *a fortiori* prohibit active membership in such a group—particularly high-level membership—coupled with knowledge of the purpose and a specific intent to accomplish it as speedily as possible. Indeed, insofar as the problem of conspiracy has a role in sustaining the power of Congress to act, it is scarcely less present here than it was in *Dennis* where the specific term "conspiracy" described the crime. For, as Mr. Justice Jackson observed in the opinion quoted earlier, "ordinary conspiracy principles" are plainly relevant to membership in an organization where membership entails such tightly disciplined, quasi-military, deeply conspiratorial activities as those of the organizations against which the Smith Act is directed. *American Communications Assn.* v. *Douds, supra,* at 432. Such membership obviously partakes of the concert-of-action, combination, and acting-together which characterize conspiracy.

Thus, the Court of Appeals in the instant case correctly observed (R. 123):

> The membership clause of the statute is, of course, nothing more or less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes and that all are guilty who join it with knowledge of such purposes; and all that the statute does is apply this fundamental concept of conspiracy to an organization having for its purpose the forcible overthrow of the government.

And this view, rendered more compelling by the experience of the intervening years, merely echoes what this Court said thirty years ago in the comparable, though measurably less acute, circumstances of *Whitney* v. *California,* 274 U. S. 357, 371–2:

> The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. * * * That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear.

To be sure, what the Court said in *Whitney*—and has never repudiated—must be read with the weighty concurring opinion of Justice Brandeis, joined by Justice Holmes. But at this juncture the dispositive fact about that opinion is precisely that it was a concurrence, joining in affirmance of the conviction. The State statute there punished membership, as does the provision here, and the conviction could have

rested on membership alone. Affirmance of the conviction could not have been consistent, therefore, with a view that a statute denouncing "membership" as a crime was void on its face.

Thus, both opinions in *Whitney* help to refute the claim that, in the teeth of *Dennis,* upholding the closely related conspiracy provision, the membership clause of the Smith Act may be held void on its face. In itself, the particular word "conspiracy" is obviously not the key to the constitutional problem. Insofar as there is importance in the nature of the public dangers to which "conspiracy" may be a shorthand reference in the Smith Act context, the same factual judgments by Congress which sustain the conspiracy provision of the Act defeat the contention that the companion membership clause is void.

3. The considerations just discussed dispose equally of the claim that the membership provision is invalid because it creates a crime involving only "guilt by association." The defendant convicted under this provision is, in the words of petitioner Scales' brief (p. 25), "held criminally liable only for his own conduct, or for the conduct of others in [a] form of concert or combination which is recognized by our law as warranting holding an individual participant responsible for the acts of other participants." There is no force in petitioner's subsequent observation (*ibid.*) that "'Membership' is not such a recognized combination." For the fact is that the kind of membership at which the Smith Act strikes—active, knowing, purposive—is precisely such a combination, long recognized by Congress and by all the world. And

the only question is whether, having recognized it, Congress was powerless to act against it. The *Dennis* case answers that question, and the square applicability of the answer here is not obscured by the facile claim that the membership in issue amounts only to "guilt by association." "Guilt by association" connotes personal innocence and unawareness. That term cannot be used to describe active membership in a group such as the Communist Party, with full knowledge of its unlawful aims and the personal intent to bring them about.

B. *Validity of the statute as applied in this case*

If, as we have urged, the membership provision is valid on its face, there can be little doubt that it could be and was constitutionally applied in this case. Viewing the indictment alone, and building upon his factually groundless premise that the membership in question is a merely passive "status," the petitioner says (Br. 23) that "[f]or all that appears from the indictment * * *, he never met another member of the Communist Party, much less discussed or plotted the violent overthrow of our Government with any other members." It might as well be said that a man who spent his career in the Navy never met another sailor. The answer is, of course, that the indictment does not charge "membership" as a bare, general abstraction applicable both to a garden club and to Murder, Incorporated, but a particular membership—membership in "a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States

by force and violence as speedily as circumstances would permit" (R. 1), and membership coupled with full knowledge of the group's aims and intent to accomplish them "as speedily as circumstances would permit" (*ibid.*). The indictment describes considerably more than a mere "status (membership) and state of mind" (Pet. Br. 23). It charges, as we have shown, that petitioner joined himself with an unlawful combination which Congress could validly proscribe as a whole and in its constituent parts.

Turning from the indictment to the proof, the validity of the statute's application becomes even clearer. The evidence, reviewed elsewhere (*supra*, pp. 7–10; *infra*, pp. 80–94), demonstrated clearly that the Communist Party—wedded to doctrines of violent revolution, tightly controlling and indoctrinating its members—teaches and advocates the forceful overthrow of the Government. It was proved beyond doubt that petitioner fully understood, supported, and intended the achievement of the Party's ends; that he was no mere innocent or trivial underling, but a *leader* in the organization with control over a significant area; and that he engaged aggressively in the Party activities his active membership and leadership entailed. The proof fully sustained both the jury's verdict and the trial judge's finding of the existence of "clear and present danger."

The considerations which answered the clear-and-present-danger argument in *Dennis* apply here as well. Petitioner is, happily, correct when he states (Br. 20–21) that neither he nor any other individual has power to overthrow the Government by force.

But it was no less clear in *Dennis* that the Party as a whole, with those who conspired to organize it, without the events they anticipated, lacked such power currently or for at least the near future. (But cf. pp. 35–38, *supra*, recalling the experience of countries like Poland and Czechoslovakia and the nature of the Party's infiltration program which, at least today and for the foreseeable future, makes the danger presented by the Party a threat capable of calamitous realization at any time.) *Dennis* teaches, however, that Congress may act against "an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists * * *." 341 U. S. at 509. The power which entitled Congress to act against a conspiracy to organize the Party is at least equally available to strike against the Party-in-being in the only way the Party can function and be reached—through its members. The fact that each member in isolation, even a leading member, may seem insignificant cannot bar Congress from dealing with the "ingredients of the reaction * * *." *Dennis*, at 511. Just as the Nation's commerce may be protected by dealing with individual instances which alone lack consequence (*e. g., Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647–648), the Communist Party's threat to the national security may be reached through the members who comprise it, at least where those members have the intent to help the Party achieve its unlawful objective. Such members will either be the leaders who undertake to launch violent action when "the circum-

stances permit", or the indoctrinated followers who will readily and enthusiastically answer the call (*Dennis*, at 509, 511). Petitioner was the Party leader in the Carolinas, a "rigidly disciplined" member of the conspiratorial group, and the one most likely to plan and carry out the Party's unlawful objective in that area.

II

SECTION 4 (F) OF THE INTERNAL SECURITY ACT OF 1950 DOES NOT AMEND THE MEMBERSHIP CLAUSE OF THE SMITH ACT SO AS TO EXEMPT MEMBERSHIP, WITH KNOWLEDGE AND INTENT, IN THE COMMUNIST PARTY

Section 4 (f) of the Internal Security Act of 1950 (Pet. Br. 49) provides that "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." Petitioner argues that this provision limits the scope of the Smith Act so that the membership clause no longer applies to membership in any Communist organization (Pet. Br. 28–34). The argument is plainly refuted by the statutory terms; Section 4 (f) refers only to membership "per se" whereas the Smith Act punishes membership, not "per se," but coupled with knowledge and intent. And petitioner's effort to find in legislative history the unlikely repealer the language of 4 (f) does not effect is demonstrably unsound.

Perhaps the use of the term "membership clause" to describe the pertinent provision of the Smith Act is the primary source of plausibility in petitioner's

argument, since it carries the implication that mere "membership" as such is proscribed. The language of the Act dispels this misconception, declaring explicitly that it is limited to anyone who "becomes or is a member of or affiliates with any such society, group or assembly of persons, *knowing the purposes thereof.*" [Emphasis added.] In addition, as we have shown (*supra*, pp. 39–41), the membership provision of the Smith Act requires for conviction an intent to achieve the group's unlawful purposes as speedily as circumstances permit. Unless those requirements of knowledge and intent are ignored, or the reference in the Security Act to membership "per se" is misread to mean membership plus knowledge plus intent, the application of the Smith Act to the offense here charged was not affected.

Petitioner suggests no reason for ignoring the words "knowing the purposes thereof" in the Smith Act. In this case, the court below not only noted their presence, but specifically decided that they added the element of knowledge as an essential part of the offense (R. 126). This interpretation was approved by the Court of Appeals for the Seventh Circuit in the companion case before this Court, *Lightfoot* v. *United States*, 220 F. 2d 661, 671, No. 32, this Term. See also *Dunne* v. *United States*, 138 F. 2d 137, 143 (C. A. 8), certiorari denied, 320 U. S. 790. When this critical difference in express terminology is coupled with the *Dennis* principle (*supra*, pp. 39–41) requiring the further element of intent for conviction under the Smith Act, no room is left for finding in the membership "per se" exemption under the Internal Security Act

an absolution for those Communist Party members who have the requisite knowledge and intent.

What petitioner's argument amounts to is the linguistically untenable claim that when Congress used the language "membership * * * per se" it meant "membership plus knowledge and intent * * * per se". This argument is inherently improbable in view of the use of the language "per se" which must have been inserted to refer to naked membership. Unless the very word "membership" includes within itself the concepts of knowledge and intent, petitioner's argument is basically inconsistent with the Act. This Court has very recently recognized that Congress can legislate and has legislated with respect to membership without either knowledge of the aims of an organization or intent to carry them out. *Galvan* v. *Press*, 347 U. S. 522, 526–528. In that case the Court held an alien deportable on the basis of membership alone without proof of knowledge of the aims of the organization. Moreover, petitioner himself agrees—in connection with his discussion of the constitutional issues—that "membership" can and does exist without knowledge of the organization's aims and without any intent to foster or achieve them.

Since the petitioner can find little comfort in the language of the two Acts, he seeks support in what he terms "logic and legislative history" (Pet. Br. 32). We have little quarrel with him on legislative history.

Neither the precursor bill (H. R. 5832, 80th Cong., 2d Sess.) nor the initial versions of the bills (H. R. 9490, S. 2311) in the 81st Congress, which eventually passed the Internal Security Act, contained anything

comparable to Section 4 (f). Apprehension then arose that the registration provisions (finally enacted as Sections 7 and 8, 50 U. S. C. 786, 787) might be held unconstitutional under the Fifth Amendment on the ground that other provisions of the Act (Sections 2 and 4 (a)) might be construed to make membership in the Communist Party in itself illegal, so that all of the proof necessary for conviction could be obtained from the registration provisions.[27] When the Senate Judiciary Committee sought to meet this objection by inserting in S. 4037 (81st Cong., 2d Sess.) a provision like present Section 4 (f), but applicable only to Sections 4 (a) and 4 (c) of the bill, certain Senators raised on the floor the objection that under this provision the registration provisions might still be claimed to incriminate members because of the Smith Act.[28] In response to this objection, the final version of the bill as it came from conference contained the present language of Section 4 (f); there can be no doubt that it was drafted with the Smith Act in mind.

This is a long way from an intention to modify the Smith Act so that membership in the Communist Party, plus knowledge of its aims, plus an intention to promote such aims, should no longer be covered. The most that can be said is that Congress intended

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[27] These doubts were expressed in a letter from the late John W. Davis to Senator McCarran, dated February 10, 1950 (96 Cong Rec. 15258), a report from Attorney General Clark (96 Cong. Rec. 14597), and a statement by Senator Langer (96 Cong. Rec. 15204).

[28] Senator Kefauver (96 Cong. Rec. 15198), Senator Humphrey (96 Cong. Rec. 14479), and Senator Lehman (96 Cong. Rec. 14190) raised this point.

the Smith Act to be read with Section 4 (f) as an aid to interpretation so that it would not be held applicable to membership alone, much as this Court read the Sherman Act and the Norris-LaGuardia Act together in *United States* v. *Hutcheson*, 312 U. S. 219, to determine the extent of the exemption from criminal sanctions granted to unions. There is no adequate ground for the improbable conclusion that the Congress which passed the Security Act meant thereafter to exempt Communists, objects of particular concern, from the membership clause of the Smith Act. If that clause did not cover Communists, it would be unlikely to cover anybody.

Elsewhere in the Internal Security Act, Congress gave further evidence that Section 4 (f) was to mean only what it said and not to provide the immunity petitioner seeks from it. Plainly, the extensive findings in Section 2 of the Act (50 U. S. C. 781) as to the menace of the Communist Party hardly comport with the effort to expand the immunity under Section 4 (b) beyond what its terms require. And, to make sure, Congress added in Section 17 (50 U. S. C. 796):

> The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes.

As to the "logic" of petitioner's position, it does not follow, as he suggests, that merely because no criminal law at that time forbade membership *per se*, one must assume the repeal of the nearest thing, membership plus knowledge plus intention. Mere membership is a far different concept, as we have stressed under Point I, *supra*, from membership plus knowledge plus

intent. There is no reason to believe that Congress desired to treat them on a par. As suggested above, it is far more logical to assume that Congress wished to treat them differently and intended Section 4 (f) as an aid to interpretation not only of Sections 4 (a) and 4 (c) of the Security Act, which also do not on their face outlaw mere membership, but also of the membership clause of the Smith Act."

In sum, the language of the various statutes, their legislative history, and logic all lead to the conclusion that membership in the Communist Party, *standing by itself*, should not be made criminal. This leaves unaffected the present case, where the statutory prohibition, the indictment, and the evidence all encompass not only membership in the Communist Party but knowledge of its aims and an intent to promote those aims.

III

THE EVIDENCE FULLY SUPPORTS THE VERDICT

A. *Evidence as to the Party*

Petitioner argues (Br. 37–38) that "the prosecution's evidence in this case with respect to the aims and purposes of the Communist Party falls far short of the standards of proof applied in courts of law." As

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[29] Similarly, the decision of Congress not to adopt Senator Humphrey's suggestion in 1954 to forbid membership as such, on the ground that it would fortify the claims to self-incrimination under the registration provisions, adds nothing to the petitioner's previous argument (see Pet. Br. 33). If the Smith Act had made membership *per se* criminal, it would have been modified by the 1950 Act. In 1954, as in 1940 and in 1950, Congress merely refrained from imposing a criminal sanction on membership alone.

we have noted, *supra*, p. 7, the evidence which was introduced in this case to establish the illicit aims and objectives of the Communist Party (Appendix A, *infra*, pp. 80–94) was substantially similar to that in previous Smith Act prosecutions involving Communist Party leaders. In each of those other seventeen Smith Act trials (14 conspiracy cases[20] and three membership cases[21]) the jury was satisfied beyond a reasonable doubt that the Party teaches and advocates the violent overthrow of the Government as speedily as circumstances would permit. Eighteen trial judges, including the trial judge in this case, were satisfied that the evidence supported the verdicts on this point. And

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[20] *United States* v. *Dennis*, 341 U. S. 494; *United States* v. *Frankfeld*, 198 F. 2d 679 (C. A. 4), certiorari denied, 344 U. S. 922; *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909; *United States* v. *Fujimoto*, (D. Hawaii, 1952), pending on appeal in the Ninth Circuit; *Yates, et al.* v. *United States*, 225 F. 2d 146 (C. A. 9), pending on writs of certiorari, Nos. 6, 7, 8, this Term; *United States* v. *Forest* (E. D. Mo., 1954); pending on appeal to the Eighth Circuit; *United States* v. *Huff*, (W. D. Wash., 1953), pending on appeal to the Ninth Circuit; *United States* v. *Mesarosh*, 223 F. 2d 449 (C. A. 3), pending on writ of certiorari, No. 20, this Term; *United States* v. *Wellman*, 227 F. 2d 757 (C. A. 6), pending on petition for writ of certiorari, No. 9 Misc., this Term; *United States* v. *Kuzma*, (E. D. Pa., 1954), pending on appeal to the Third Circuit; *United States* v. *Brandt* (N. D. Ohio, 1956), pending on appeal to the Sixth Circuit; *United States* v. *Silverman*, (D. Conn., 1956), pending on appeal to the Second Circuit; *United States* v. *Trachtenberg*, (S. D. N. Y., 1956), pending on appeal to the Second Circuit; *United States* v. *Bary*, (D. Colo., 1955), pending on appeal to the Tenth Circuit.

[21] *United States* v. *Lightfoot*, 228 F. 2d 861, pending on writ of certiorari, No. 32, this Term; *United States* v. *Noto*, (W. D. N. Y., 1956), pending on appeal to the Second Circuit; *United States* v. *Blumberg*, (E. D. Pa., 1956).

a similar conclusion was reached by twenty appellate judges who reviewed the evidence."

Urging that the jury was not free to reach the same conclusion in this case, petitioner focuses his argument exclusively on the witness Lautner (Br. 38–39), who, he points out, left the Party before the period covered by the indictment. As to this witness alone, it is clear, as the court below said (R. 127), that his description of the Party's aims and doctrine over a long period until 1950 had substantial probative force in view of the absence of any evidence of a change. Moreover, petitioner wholly ignores the other evidence, which did not merely fail to show a change, but, as the court observed (R. 127), "clearly indicated that there has been no such change." The testimony of the witnesses Clontz and Childs was plain that the Party continued, continuously after 1950, to teach and advocate the violent overthrow of the Government (*supra*, pp. 8–9, 20–23). Childs told in detail how he was taught such doctrine in 1952 at the secret Party training school where petitioner was an instructor (R. 67–96).

Petitioner further assails Lautner's testimony with the assertion (Br. 38) that this witness expressed a merely "personal opinion" on the issue of advocacy of force and violence, "despite contrary statements by various Party officials and in Party publications * * *." However, Lautner testified as an expert witness on the basis of his twenty years' experience as a high ranking official of the Communist Party, his intimate association with other top leaders as well as

[11] Including five of the full court of seven in the *Mesaros* case.

with rank-and-file members of the Party, and his personal participation in National Conventions, National Committee meetings, and teaching activities of the Party (Tr. 439). On the basis of such qualifications, he testified that the ultimate aim of the Communist Party of the United States is to bring about the overthrow of the Government by force and violence when certain subjective and objective conditions are present (Tr. 439–440). His qualifications to speak as an expert were clear. "It is difficult to see * * * how better evidence of the teachings and purposes of a party could be obtained than from the testimony of those who heard and participated in the teachings sponsored by the party." *Frankfeld* v. *United States*, 198 F. 2d 679, 689 (C. A. 4), certiorari denied, 344 U. S. 922. Characterizing the testimony as "personal opinion" does not alter the decisive point that it was properly submitted to the jury and that it was for the jury to accept or reject. *United States* v. *Dennis*, 183 F. 2d 201, 229 (C. A. 2), affirmed, 341 U. S. 494. Similarly, the contrary public professions of Party leaders and publications were for the jury's appraisal, and petitioner's reliance on these is only a vain effort to ask that the evidence be reweighed here once again.

We submit, in short, that the jury in this case, like so many juries and courts before it, was clearly justified in concluding that the Communist Party, in the relevant period, taught and advocated overthrow of the Government by force and violence.

B. *Evidence as to Petitioner*

Acknowledging his role as a Party functionary, petitioner contends (Br. 35–37) that the evidence was

insufficient to show his knowledge of the Party's aims and intent to achieve them. Of course, petitioner's status as a *leader* of such a rigidly disciplined and indoctrinated organization is in itself strong evidence against the suggestion that he might not have known what the Party was about or purposed the furtherance of its ends. However, the record goes far beyond this and shows not only that petitioner was "in contact with" the Party's aims (Pet. Br. 36), but that he himself actively taught the Party doctrine of the necessity for and desirability of the violent overthrow of the United States Government as speedily as circumstances would permit.

In the years between 1948 and 1951, petitioner acted as a personal tutor to the witness Clontz, supplying him with volumes of Communist Party literature and explaining to him the Party's vanguard role in the coming proletarian revolution (*supra*, pp. 10, 13–20). Petitioner directed the witness Childs to remain in industry where there were unions because the Communist Party considered that trade unions are the "schools of the revolution" (Tr. 1062). In 1952, petitioner was instrumental in establishing a secret Communist Party training school which was held in North Carolina, at which he was an instructor, and at which Childs was taught that the ultimate aim of the Communist Party always remains the forceful and violent overthrow of the Government (R. 87–88). Tactics may change from day to day, Childs was taught, but the strategy—the ultimate objective, over-

throw of the existing government—never changes (R. 87–90).[33]

Reflecting and acting upon the revolutionary purposes and teachings of the Party, petitioner explained to Clontz the nature and importance of underground activities (R. 55). He explained that in an emergency, "or if a war broke out with the Soviet Union, he would immediately go underground" himself (*ibid.*). And in December 1951, during the fighting in Korea, petitioner told Clontz that he had in fact gone underground, instructing Clontz to deal with a new contact and cautioning against the use of the mails, telephone, or telegraph for communications with him (R. 56). In these activities, petitioner gave concrete point to the revolutionary doctrines he taught and followed (see R. 41); vividly belying his effort now to deny the evidence of his intimate knowledge and unlawful intent with respect to the Party's objectives.

Petitioner erroneously asserts (Br. 36) that the "only testimony relating to any declaration by the

[33] This was in accord with the statement of William Z. Foster in an article in the June 1950 issue of *Political Affairs*, (Ex. 23) the official theoretical organ of the Communist Party (Tr. 326). In this article Foster repudiated as incorrect certain formulations which had appeared in his book *Twilight of World Capitalism* (Def. Ex. 1, Tr. 524), and he pointed out (Tr. 525) that "regardless of tactical variations that may be necessary as the class struggle proceeds, the road to socialism remains the same, through the defeat of the capitalist class and the establishment of the dictatorship of the proletariat."

It may be noted too that this hardly supports petitioner's assertion (Br. 38–39) that Lautner's testimony was contrary to statements of Party officials and publications.

defendant or in his presence, wherein overthrow of the Government by force is directly adverted to, concerns a conversation (R. 35) in December 1948 * * *." Actually, the record is replete with declarations made by petitioner to witnesses Clontz and Childs wherein petitioner advocated forceful overthrow of the Government. To begin with, we recall the evidence to which petitioner himself refers that when Clontz, after reading Communist literature furnished by petitioner advocating the necessity of the violent overthrow of capitalist governments, inquired whether Communism could be brought to the United States through the process of education, petitioner replied that the use of force was the only answer (R. 35).[34] On a later occasion, in the spring of 1950, petitioner pointed out to Clontz that the Communist Party of the United States could count on assistance from the Soviet Union when the time for revolution was ripe. Petitioner said that "as a practical matter the Soviet Union would not land troops at the commencement of the revolution, that the Communists here in the United States would have to start the revolution themselves" (R. 49–50). And Childs testified that petitioner had advised him that it would be necessary for the Red Army to "liberate" this country if, when the time for revolution arrived, the Communist Party was unprepared to cope with the situation (R. 95–96).

Again, we have Childs' testimony that at the Party school organized and directed by the petitioner, in the

[34] In his argument on this point, petitioner asserts that the testimony with respect to the 1948 declaration is incredible. But that was, of course, a matter for the jury to decide.

summer of 1952, it was stressed that the works of Marx, Lenin, and Stalin "are the basic theory on which all final decisions [of the Party] are made" (R. 86) and that the ultimate purpose of the Party, as embodied in those teachings, always remains the overthrow of the Government by force and violence (R. 87–88). Another member of the staff stated that "Socialism * * * can be established only through the overthrow of the capitalists" (R. 90), who, the students were told, "would not surrender peacefully" (Tr. 1115).

Given the nature of the offense, it would be absurd to expect, and it is not required, that there be even more extensive evidence in the form of explicit statements by the petitioner himself announcing his knowledge and intent.[35] Those we have summarized are surely numerous and damaging enough. Together with the unquestioned fact that petitioner was a Party member and its leader in the Carolinas, and bearing in mind the proof of the duties and activities such a role entailed, we submit it would have been incredible to suppose that petitioner was ignorant of the Party's aims or lacking in intent to help achieve them. At the least, the jury clearly had ample ground for finding the requisite knowledge and intent. And so the

[35] As the court below pointed out (R. 130–131), the charge here is "membership" with knowledge and intent and does not, strictly speaking, require evidence of petitioner's own statements as a teacher and advocate. We have shown, however, that there was proof of many such statements from which, in addition to his position and conduct in the party, the jury was plainly warranted in inferring the necessary knowledge and intent.

Court of Appeals was correct when it rejected the claim of insufficient evidence and said (R. 133):

> Uncontradicted testimony as to statements by him showed that he was thoroughly aware of the unlawful aims and purposes of the party, was in sympathy with those aims and purposes and entered into its activities with complete understanding of what was involved. On the evidence before it, the jury was amply justified in finding him guilty of the crime charged * * *.

IV

PETITIONER RECEIVED A FAIR TRIAL

A. *The Denial of Petitioner's Motion Challenging the Composition of the Grand Jury Was Proper*

Petitioner urges that the trial court committed prejudicial error in refusing to grant the motion challenging the composition of the grand jury which indicted him (Br. 39–41). The motion attacking the grand jury panel was filed prior to trial and concurrently with a similar motion of the petitioner attacking the then existing method of selecting petit jurors. The Government objected to the motion as to the grand jury on the ground that it was not timely filed. Since the evidence which could be adduced on the method of selecting jurors applied both to the grand and petit jury systems, the court reserved to the Government its objection as to timeliness and proceeded with a hearing on the merits. At the conclusion of the hearing, the court denied the motion attacking the grand jury panel because (1) the motion was not timely filed and (2) the evidence produced at the

hearing failed to show that the method of selecting jurors was improper (Motion Tr. 150–153).[38] Each of these grounds is independently sufficient to sustain the ruling.

1. *Petitioner Waived the Right to Challenge the Composition of the Grand Jury*

As shown in the Statement (*supra,* p. 5) and in the trial court's undisputed findings (Appendix B, *infra,* pp. 95–99), petitioner, after being arraigned on December 16, 1954, was granted two lengthy extensions totaling 64 days in which to file pre-trial motions. At the end of these extensions, on February 18, 1955, petitioner filed numerous pre-trial motions but not the one now in question attacking the composition of the grand jury. This motion was not filed until March 8, 1955, more than two weeks after the ample extensions granted by the trial court had expired. The court found (Appendix B, *infra,* pp. 95–100), and there is no contrary suggestion, that the information on which this belated additional motion was based had been available to defendant and his counsel from the time of the indictment, and that there had been not even an attempt to explain or justify the inordinate delay.

In these circumstances, the trial court was clearly justified in rejecting the motion as untimely. Under Rule 12 of the Federal Rules of Criminal Procedure, such a motion must be made before the plea is entered or "within a reasonable time thereafter" when per-

[38] See Appendix B, *infra,* pp. 95–100, Findings of Fact, Conclusion of Law and Order filed by the trial court on April 15, 1955.

mitted by the court. Failure to present the motion within the prescribed time constitutes a waiver. *Carruthers* v. *Reed*, 102 F. 2d 933, 939 (C. A. 8); *Wright* v. *United States*, 165 F. 2d 405, 407 (C. A. 8); *Universal Milk Bottle Service* v. *United States*, 188 F. 2d 959, 962 (C. A. 6); "Notes of Advisory Committee on Rules" following Rule 12, p. 2532 in 18 U. S. C. The Rule provides that "for cause shown" the court "may grant relief from the waiver." But no cause was shown here and there is no basis for questioning the propriety of the decision that the waiver effectively barred the complaint against the grand jury. *Frazier* v. *United States*, 335 U. S. 497, 503; *Shaw* v. *United States*, 1 F. 2d 199, 201 (C. A. 8); *Nations* v. *United States*, 52 F. 2d 97, 99 (C. A. 8); *Moffat* v. *United States*, 232 F. 522, 528 (C. A. 8); *Charles Burns Hornbook* v. *United States*, 216 F. 2d 212 (C. A. 5).

2. *In any Event, the Complaint is on its Merits not Ground for Reversal of the Convention*

Petitioner premises almost his entire argument on this point upon his allegation that it was impossible for the Jury Commission to know whether the jury box contained the requisite 300 names of qualified persons at the time of drawing (Br. 40), and that there was, therefore, a failure to meet the requirements of 28 U. S. C. 1864. This contention is rebutted by the evidence adduced at the hearing.

The Deputy Clerk testified, that, at the time the indicting grand jury panel was drawn, the jury box contained "something in the neighborhood of probably 500" names (Motion Tr. 83). He further stated

that he had personal knowledge of the background and status of practically all of the persons who were in the box, that they represented a cross-section of all walks of life in the community, and that all persons selected to serve were qualified (Motion Tr. 84–85).

The Clerk of the District Court testified that the procedure used by the Commission in selecting names for the jury box[37] had been commended by members of the bar throughout the district and by others for the fairness of the jurors serving in the courts (Motion Tr. 48, 49). This witness also testified that the procedure used had been discussed with inspectors from the Administrative Office of the United States Courts and with other clerks and visiting judges; and that he had found this to be "substantially the procedure followed elsewhere," uncriticized by any of these sources (Motion Tr. 51).

Aside from the foregoing, no testimony was adduced by petitioner as to the number of qualified names in the box at the time of the grand jury selection. It is thus evident that the inference petitioner would have

[37] In selecting names for the grand and petit juries, requests were sent out on form letters, under the joint direction of the Clerk and Jury Commissioner, who constitute the Jury Commission, to men of knowledge, character and standing who knew the people in the respective counties, asking them to send in suitable names for jury service (Motion Tr. 18–30). Upon the return of these forms, the commission determined the eligibility of the names submitted and eliminated those found to be ineligible to serve. The eligibility was determined by the Clerk or Jury Commissioner's personal knowledge of the individuals' names or from comments of the persons requested to send the names. All names not eliminated by this process were then placed in the jury box on separate cards indicating the names and addresses of the persons selected (Motion Tr. 33–35).

this Court draw falls far short of rebutting the presumption of regularity which attends the work of the Jury Commissioner and Clerk of the Court, a presumption which may be overcome only by clear and convincing proof. *Frazier* v. *United States*, 335 U. S. 497; *Fay* v. *New York*, 332 U. S. 261; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217. In addition, even if it be assumed *arguendo* that the Jury Commission was not certain that there were 300 *qualified* names in the jury box at the time of the drawing, this fact standing alone is an insufficient basis, without a showing of prejudice, upon which to nullify an indictment.[28]

And, far from suggesting prejudice, the record demonstrates that there was none. The testimony showed that the Clerk never intentionally or systematically excluded any class or group and that he sought a wide selection of jurors from all walks of life (Motion Tr. 47). Acting on the express direction of the District Court, the Jury Commissioner made special efforts to secure women and Negro jurors (Motion Tr. 25), and there was no exclusion whatever of minority political or racial groups (Motion Tr. 58).

[28] "Does this statute mean that there must be 300 names in the box of qualified persons as a condition of any valid drawing of any jurors therefrom? If this was the meaning of Congress it would involve the duty on the part of the commissioners of determining in some reliable manner the question of eligibility, and would have rendered it necessary for the legislature to have proceeded further and to have granted them authority and process for hearing and determining the matter in a quasi-judicial manner; but they are not triers, nor have they the power to appoint triers. I do not think this is the meaning of the statute." *United States* v. *Rondeau*, 16 Fed. 109, 111 (E. D. La.).

On this record, petitioner cannot prevail in his argument (Br. 41) that, because the Clerk and Jury Commissioners sent letters to various individuals and leaders of organizations seeking suggested names, they unlawfully delegated their duties so that the indictment must now be quashed. Disposing of a similar contention, the Court of Appeals for the Third Circuit recently said (*Dow* v. *Carnegie-Illinois Steel Corporation*, 224 F. 2d 414, 427):

> * * * The jury officials could in the exercise of their discretion resort to others for the suggestion of names so long as it could reasonably be expected that a cross-section would thereby be obtained, and using the names taken from such a variety of sources does not result in an unlawful delegation of duty by the officials.

The evidence here gives every reason to believe that a proper cross-section was obtained and that the Jury Commissioners duly exercised their duty of selection. As the Third Circuit observed in the *Dow* case (*supra*, at 427), such circumstances leave no basis for invoking the rule of *Glasser* v. *United States*, 315 U. S. 60, where the vice was solicitation of names from only a single organization with a resulting list improperly weighted. See also *United States* v. *Dennis*, 183 F. 2d 201, 218 (C. A. 2), affirmed on other issues, 341 U. S. 494; *United States* v. *Flynn*, 216 F. 2d 354, 378ff (C. A. 2), certiorari denied, 348 U. S. 909; *Walker* v. *United States*, 93 F. 2d 283, 291 (C. A. 8).

It may be noted, finally, that after denial of the motion challenging the grand jury selection on the ground that the motion was untimely and also on the

merits, the trial court observed that a revised list of prospective jurors was then being prepared by the jury officials involved in this case (Motion Tr. 153–154). Petitioner's trial counsel agreed that the method of selection of the revised list of jurors was satisfactory and met all his objections (Motion Tr. 154–164). Accordingly, the court quashed the then existing venire of petit jurors and ordered a new panel drawn under the revised method of selection (Motion Tr. 164). It would appear, therefore, that any defect of which petitioner could have made timely complaint has disappeared for the future. In view of the complete absence of prejudice, and apart from other reasons already stated, there is no sound basis in petitioner's tardy motion for invoking the supervisory powers of this Court.

B. *Evidence Relating to the Aims and Purpose of the Communist Party and Petitioner's Knowledge and Intent Was Properly Admitted*

Petitioner complains (Br. 41–43) of the admission of certain evidence which was introduced to show the unlawful aims of the Communist Party and his unlawful knowledge and intent. Contrary to his contentions, the evidence in question was all relevant to these material issues and therefore admissible.[39]

Specifically, petitioner complains of "evidence concerning political, social, and economic causes sup-

[39] The trial court excluded evidence as to the circumstances surrounding the witness Lautner's expulsion from the Party as well as certain evidence with regard to the Party's teaching on the question of religion although the prosecution felt that such evidence was properly admissible. See *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909.

ported by the Communist Party" (Br. 42), referring to evidence of the Party's position on the so-called "Negro question" and the war in Korea. The Party's teachings on the Negro question, particularly with reference to the right of self-determination and the proposed establishment of a separate Negro nation in the South, was shown to be a basic part of the strategy and tactics of the proletarian revolution (R. 36, 39). *Foundations of Leninism* (Ex. 5), which petitioner described as the bible for present-day Communists, explains the method by which the Party's program of self-determination is to be used in facilitating the forcible overthrow of the imperialist government:

> Lenin has proved, and the imperialist war and the revolution in Russia have confirmed it, that the national question can be solved only in connection with and on the basis of the proletarian revolution, and that the road to victory in the West leads through the revolutionary alliance with the liberation movement of the colonies and dependent countries against imperialism. The national question is part and parcel of the general question of the proletarian revolution and of the dictatorship of the proletariat [pp. 78–79].

Similarly, the testimony with regard to the Party position on the Korean war was properly admissible not only, as the court below pointed out (R. 127), in showing the pattern of arousing dissension to foster the Party's objectives, but also to illustrate the tactic of shifting alliances with other groups in seeking short-range Party objectives (R. 85).

As to petitioner's objection (Br. 42) to the evidence of a demonstration by a Communist leader showing how a pencil could be used to kill a man on a picket line, the record discloses that this instruction was given at a secret Party school in the summer of 1952 conducted by the petitioner for a hand-picked group of Party faithful (R. 93–94). The demonstration was given by the District Organizer of the Communist Party of Virginia and a member of the staff of the school who was present at this as well as all other phases of instruction at the school. The instructor, while giving his demonstration, explained to his students that they might need to use this information some day when they were on a picket line. The relevancy of this testimony is apparent in the light of the Party program of industrial concentration and its self-appointed role as vanguard of the working class which was discussed in some detail at the school (R. 81–82; 85–88; Ex. 22).

Petitioner complains, finally (Br. 42–43), of the trial court's admission of testimony by the witnesses Lautner and Clontz concerning acts and declarations of third persons which did not take place in petitioner's presence. The record discloses, however, that all of this testimony bore directly on the material issues of the Communist Party's nature and petitioner's knowledge and intent with respect thereto. Clontz testified principally to conversations he had with the petitioner. His testimony regarding statements made by leading Party functionaries at the Jefferson School of Social Science in New York related back to the petitioner, for Clontz was sent to the

school for such indoctrination by the petitioner and discussed these teachings with petitioner upon his return (R. 51–54). Similarly, Clontz told of statements by Herbert Aptheker, described by petitioner as "one of the scholars of the Communist Party", and again testified to petitioner's approving discussion of the statements (R. 42). It is not disputed that the nature of the Communist Party was in issue in the case. It seems clear that this problem can be explored only by examining the acts and declarations of Party leaders and members, and the testimony of which petitioner complains was plainly relevant and admissible for this purpose. Moreover, the evidence revealing petitioner's direct connection with the statements—both in his role of recruiting disciples to hear them and in his elaboration and endorsement of them—was relevant to the issues of his knowledge and intent.

The testimony of Lautner was admissible on similar grounds. Lautner's background in the Party qualified him to speak as an expert on its doctrines and objectives. *United States* v. *Dennis*, 183 F. 2d 201, 229 (C. A. 2), affirmed, 341 U. S. 494; *Frankfeld* v. *United States*, 198 F. 2d 679, 689 (C. A. 4), certiorari denied, 344 U. S. 922. See *infra*, pp. 80–81. Here again, petitioner's objection that the testimony concerned conduct and declarations of persons other than himself would, if it were valid, require a conclusion that the nature of the Party, a material issue, could never be proved. For the Party, of course, is by definition a group. And the group's character could not be known by examining only the individual

member in isolation. In a way, this subordinate evidentiary argument of petitioner's harks back to his effort on the constitutional issue to divest "membership", as used in the Smith Act, of its essential meaning—of its denotation of concert with and adherence to others. The fallacy of misdefining words defeats his contention here as well as there.

C. The Trial Court Acted Well Within the Limits of its Discretion in Denying Petitioner Access to Reports Which Had Been Transmitted to the Federal Bureau of Investigation by the Witnesses Clontz and Childs

Petitioner argues briefly (Br. 43–44) that the trial court committed reversible error when it denied him access to reports which had been made to the F. B. I. by the witnesses Clontz and Childs. The argument is without merit.[40]

Prior to trial, in what was obviously designed as a broad fishing expedition, petitioner moved pursuant to Rule 17 (c), F. R. Crim. P., for pre-trial inspection of documentary evidence in the possession of the Government and for all written statements previously furnished by the witnesses who would be called for the prosecution. During the trial, while the two witnesses in question were being cross-examined, petitioner again sought inspection of their written statements, which were in the possession of the F. B. I. and had not been used to refresh their recollection.

[40] A similar contention, arising from facts which differ in some respects from the ones here, is before the Court in *Jencks* v. *United States*, No. 23, and is discussed at greater length in our brief therein (Point I).

Although there was no suggestion, and there is none now, of any foundation for a belief that the written statements would impeach or contradict the witnesses' testimony in any way, the trial judge examined the statements himself *in camera* for the purpose of determining whether they would have any impeaching value and should therefore be made available to petitioner.[a] Finding no inconsistencies between the testimony at the trial and the written statements, he denied the motion for inspection (Tr. 1358, 1380–1381).

We submit that the trial judge's inspection of the documents, where there was no foundation of any kind for exploring them, gave petitioner even more than his due, and that there was plainly no abuse of discretion in denying the inspection petitioner sought. For it is well established that a "large discretion must be allowed the trial judge" with respect to the production of documents; and that in the absence of abuse the exercise of that discretion will not be upset. *Goldman* v. *United States*, 316 U. S. 129, 132; *D'Aquino* v. *United States*, 192 F. 2d 338, 375 (C. A. 9), certiorari denied, 343 U. S. 935; *Little* v. *United States*, 93 F. 2d 401, 407 (C. A. 8), certiorari denied, 303 U. S. 644; *Arnstein* v. *United States*, 296 Fed. 946, 950 (C. A. D. C.), certiorari denied, 264

[a] Compare the following line of cases in the Second Circuit: *United States* v. *Andolschek*, 142 F. 2d 503; *United States* v. *Krulewitch*, 145 F. 2d 76; *United States* v. *Ebeling*, 146 F. 2d 254; *United States* v. *Simonds*, 148 F. 2d 177; *United States* v. *Cohen*, 148 F. 2d 94; *United States* v. *DeNormand*, 149 F. 2d 622; *United States* v. *Beekman*, 155 F. 2d 580; *United States* v. *Grayson*, 166 F. 2d 863.

U. S. 595. Cf. *Glasser* v. *United States*, 315 U. S. 60; *Alford* v. *United States*, 282 U. S. 687. This is so even where the documents sought have been used at the trial for the purpose of refreshing a witness' recollection. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233, 234. Where, as here, the documents have not been used for that purpose, the trial court's discretion is even greater. *Goldman* v. *United States, supra.* These familiar principles are controlling in this case.

There is no basis for another view in the argument (Pet. Br. 44) that, in his own examination of the written statements, the trial judge observed that he would not regard an omission as an inconsistency (R. 96). Apart from the fact that the court could have refused to examine the statements altogether, and apart from whether its statement on omissions was sufficient as an abstract matter, the fact is that the trial judge found neither omissions nor inconsistencies in his examination. Thus, after examining the statements of the witness Clontz, he advised counsel that he had found "no inconsistency in the reports with his testimony * * *. I can go further and say that I did not find that he testified to matters that were not in the report, but I think I told you at the time that I would examine it only for inconsistencies" (Tr. 1358). Similarly, after reading the Childs report he said: "I found no report in the Federal Bureau of Investigation which contains a statement inconsistent with what the witnesses testified to and I do not find that he testified to anything he did not report" (Tr. 1381). It is clear that, even on peti-

tioner's extreme and dubious premises, his rights to explore for hoped for inconsistencies were more than fully upheld.[42]

D. *The Congressional Findings in the Internal Security Act of 1950 and the Communist Control Act of 1954 Did Not Preclude a Fair Trial*

Petitioner's final contention (Br. 44–45) is that, without a shred of concrete evidence of prejudice, it must be presumed that he could not have had a fair trial because Congress, in the Internal Security Act of 1950 (50 U. S. C. 781) and the Communist Control Act of 1954 (50 U. S. C. 841), made findings that the Communist Party aims at the violent overthrow of the Government. Apart from the fact that he did not preserve this point for appeal and raises it for the first time in this Court,[43] the argument must be rejected.

The argument proceeds on the unrealistic and unacceptable assumptions, without proof, that the jurors (1) were in fact familiar with the statutes in question and (2) would ignore the court's instructions to determine the nature of the Communist Party from the evidence before them for themselves, and merely follow unthinkingly the findings of Congress in the

[42] At the Government's request, the written statements inspected by the trial judge *in camera* were sealed as part of the record in this case (Tr. 1382–1384) and are thus available for this Court's review.

[43] Petitioner did argue below, as he does here (see pp. 51–56, *supra*), that Section 4 (f) of the Internal Security Act bars prosecution under the membership provision of the Smith Act. But that argument is clearly a different one from the belated contention under consideration at this point.

Internal Security Act and the Communist Control Act. These assumptions attack the basic premises of the jury system itself. If they are correct, it must follow that the *Dennis* case and all other Smith Act prosecutions were erroneous and that the Communist Party, by becoming a threat so grave as to require explicit recognition by Congress and much of the public, has immunized its organizers and members against prosecution. As the Court of Appeals for the Seventh Circuit said, rejecting the same argument, in *United States* v. *Lightfoot,* 228 F. 2d 861, 870, pending on certiorari, No. 32 this Term:

> In effect, it is defendant's position that all persons subject to prosecution under the Smith Act are immunized from prosecution indefinitely, or at least as long as the Communist Control Act remains a part of the laws of this nation. We do not agree. If any jury had any such prejudgment, the instructions of the Court cured their error. Furthermore, whether any such belief existed in the mind of any juror, might have been discovered on the *voir dire* examination.

Petitioner was certainly entitled to investigate, in this as in any other case, to determine whether the jurors might be disabled by bias from trying him fairly. But the conclusive presumption of bias he seeks to establish rests only on a speculative hypothesis which cannot avail to impugn the jury's verdict. Compare *Accardi* v. *Shaughnessy,* 347 U. S. 260, with *Shaughnessy* v. *Accardi,* 349 U. S. 280.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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APPENDIX A

EVIDENCE THAT THE COMMUNIST PARTY IS A GROUP OR SOCIETY TEACHING AND ADVOCATING THE OVERTHROW OF THE UNITED STATES GOVERNMENT BY FORCE AND VIOLENCE

In July 1945, the Communist Party was reconstituted, basing itself "upon the principles of scientific Socialism, Marxism-Leninism" (Ex. 17) and rejecting the Browder program of class peace reflected in the Communist Political Association as "notorious revisionism" which violated the most fundamental principles of Marxism-Leninism (Ex. 16, R. 20).

Government witness Lautner [46] testified (R. 23) that the words "Marxism-Leninism" as historically used throughout the Communist movement meant—

> * * * the writings of Marx, Engels, Lenin and Stalin, and its applications in this era, which began about the turn of the century, which era is known as the era of monopoly capitalism and imperialism. That is the theory and tactics of the proletarian revolution in general and the theory and tactics of dictatorship of the proletariat in particular * * *.

[46] Lautner joined the Party in 1929, and for the greater part of his Party career, until his expulsion in 1950; was a high-ranking paid functionary. He attended the Party's highest school, the National Training School, in 1930 and 1941 (R. 13, 15, 23); was a District Organizer in West Virginia from 1936 to 1940 (R. 14–15); taught Party classes from 1946 to 1948 (R. 21); attended National Party Conventions in 1936, 1938, 1940, 1942, 1945 and 1948 (Tr. 313); was a member of the National Review Commission from 1948 to 1950, and from 1947 to 1950 headed the New York State Review Commission (R. 15–16).

The revolutionary character of the program to which the Communist Party reverted at the 1945 National Convention and consistently adhered thereafter is illustrated by the following testimony of Lautner (R. 28–29):

> The ultimate aim of the Communist Party of the United States is when these two conditions, objective and subjective conditions, are given, that I described before, a national crisis or a war, on one hand, and the ability of the Communist Party to give leadership to decisive sections of the working class, neutralize other sections of the population, when these conditions are present, to bring about the destruction by force and violence of the imperialism, monopoly capitalism and its governments, that is the basic aim and objective of the Communist Party, and through destruction of the state apparatus and power of monopoly capitalism, imperialism, to bring about socialism through the dictatorship of the totalitariat [sic].

This testimony that the Communist Party is committed to the violent overthrow of the Government of the United States and its destruction is corroborated by basic Marxist-Leninist "classics" which treat openly the subject of force and violence in the establishment of the dictatorship of the proletariat and stress that the goal of the Party can be reached only through actual class revolt attended by violence and bloodshed (R. 24–25). Among the texts which Lautner verified as being used at Party schools were the following:

> *Communist Manifesto* (Ex. 1); *Foundations of Leninism* (Ex. 5); *Problems of Leninism* (Ex. 6); *State and Revolution* (Ex. 7); *Left Wing Communism* (Ex. 8); *What Is To Be Done?* (Ex. 9); *Imperialism* (Ex. 10); *History*

of the Communist Party of Soviet Union (B) (Ex. 12); *Strategy and Tactics of the Proletarian Revolution* (Ex. 13); *Dictatorship of the Proletariat* (Ex. 14); *Theory of the Proletarian Revolution* (Ex. 15); *Struggle Against Revisionism* (Ex. 16); *Outline on Fundamentals of Marxism* (Ex. 18).

These texts contain the same principles of Marxism-Leninism which Lautner studied in the 1930 and 1941 National Party training schools, and which he later taught in supervised Party classes in the years 1946, 1947 and 1948 (R. 23).

When, in July 1945, the Communists turned their backs on the concept of peaceful cooperation between all progressive forces in our society, and established a new Communist Party for a resumption of the Marxist-Leninist class war, its leaders promptly directed their attention to a revitalized training program in Marxism-Leninism (R. 21). Among the outlines issued by the Party to facilitate its program of Marxist-Leninist training is the *Outline on Fundamentals of Marxism* prepared by the National Education Commission (Ex. 18.)[45] Because this *Outline* demonstrates that the Party itself relied in its teachings on the particular Marxist-Leninist documents which were read or cited to the jury in this case to show the Party's revolutionary program, and because it is perhaps the most compact source reference to these "classics", it serves as an authoritative exposition of the Party's doctrines and aims.

Lesson I (pp. 1–3) is an introduction to Marxist-Leninist theory. It sets forth the Leninist slogans

[45] This *Outline* was used extensively by Lautner as a guide in teaching classes in Marxism-Leninism, political economy, Party organization, Party structure, democratic centralism and Party discipline to Party functionaries in New York City from 1946 to 1948 (R. 21–22).

"Without a revolutionary theory there can be no revolutionary movement" and "Our teaching is not a dogma but a guide to action," as showing the importance of Marxist-Leninist theory. It refers to the theory of Marx and Engels that in our capitalist society there is a continual class war between the capitalists and the workers, which will be ended by socialism, as in the Soviet Union.[*] The lesson refers to Stalin's analysis of Lenin's contribution to Marxism, as set forth in *Foundations of Leninism* (Ex. 5, pp. 9–10). Stalin explained that Leninism is the further development of Marxism on an international scale and with its revolutionary content restored. Thus—

> Leninism is Marxism of the era of imperialism and of the proletariat revolution. To be more exact, Leninism is the theory and tactics of the proletarian revolution in general, the theory and tactics of the dictatorship of the proletariat in particular.

Lesson II deals with the general features of the capitalist system and the contradictions in the system. After detailing the economic basis for the class war, the *Outline* states that socialism is the only solution. The means by which the socialist state is to be achieved is (p. 6) that

[*] Chapter I of the *Communist Manifesto* (Ex. 1), one of the assigned readings on this subject, traces this class antagonism, which is described as "the more or less veiled civil war, raging within the existing society" to the point "where the war breaks out into open revolution and where the violent overthrow of the bourgeoisie lays the foundation for the sway of the proletariat" (p. 27). The other assigned reading concludes that "capitalism is pregnant with revolution, whose mission is to replace the existing capitalist ownership of the means of production by Socialist ownership." *History of the C. P. S. U.*, p. 126 (Ex. 12).

> The proletariat seizes political power and turns the means of production into state property.

The *Outline* rejects the concept, which Stalin also rejects (see Ex. 5, pp. 55–56), that the economic structure in the United States excepts the United States from the inherent contradictions of capitalism, which require its overthrow." The *Outline* charges the Browder program in 1944–1945 with rejecting the Marxist analysis of the development of capitalist economy and adopting a bourgeois program (p. 6).

Lesson III deals with the role of trade unions in developing the class struggle and states the Party's function as that of converting the unionists' economic struggles into Communist political struggles. One of the points made in the *Outline* is that trade unions should be made "schools for Communism."

Lesson IV teaches that, after the revolution, the state is in the form of the dictatorship of the proletariat, which has the role of destroying capitalism and organizing socialism (pp. 13–15). Lenin is quoted as describing the new dictatorship as an alliance between the proletariat and some members of the peasantry, intelligentsia, etc., for the purpose of completely overthrowing capitalism and establishing socialism. It is characterized as a new type of state with a new type of democracy. The working class cannot take possession of the existing state; what is required is "the shattering of the former state power and its replacement by a new and really democratic state." But Lenin tells Party members what "democratic" means: it is "the democracy of the exploited majority based

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[47] Lenin's *State and Revolution* (Ex. 7) is quoted in the outline (p. 5) to the effect that this form of capitalist economy proves the "nearness, ease, feasibility, and urgency of the Socialist revolution."

upon restriction of the rights of the exploiting minority and directed against this minority." It is anti-Marxist to hold "that socialism can be achieved without the prior conquest of political power by the working class—that socialism can gradually 'evolve' out of capitalism without the establishment of a state directed by the working class which will replace the capitalist state."

The *Outline* assigns for reading Chapter IV of *Foundations of Leninism* by Stalin (Ex. 5) which is entitled "The Dictatorship of the Proletariat." Comparison of the text in the *Outline* relating to this subject with Chapter IV discloses that the text is derived in large part from that chapter. Stalin points out that while the "revolution can vanquish the bourgeoisie, can overthrow its power," the dictatorship is necessary as a means "to crush the resistance of the bourgeoisie" (p. 27). The "conquest of power" as the *Outline* describes it, does not mean a mere change in the personnel of the government. Instead, says Stalin, it is a new state, which "is a revolutionary power based on the use of force against the bourgeoisie" (pp. 52–53). Thus (p. 56)—

> the law of violent proletarian revolution, the law of the smashing of the bourgeois state machine as a preliminary condition for such a revolution, is an inevitable law of the revolutionary movement in the imperialist countries of the world.

The *Outline* also assigns for study Lenin's *State and Revolution* (Ex. 7), which was written on the eve of the Bolshevik revolution. In *State and Revolution*, Lenin so unreservedly regarded the use of force and violence as a necessary means to the achievement of the dictatorship of the proletariat that he was at pains to distinguish the Communists from other groups who subscribed to the view that the means are to be peace-

ful (see pp. 18–19). Thus, Lenin says (p. 9) that Kautsky forgot or glossed over the fact that "it is clear the liberation of the oppressed class is impossible not only without a violent revolution, but also without the destruction of the apparatus of state power."

The view that Marx contemplated a gradual development toward socialism rather than "a seizure of power" is dismissed by Lenin as a "vulgar interpretation"; "as a matter of fact, exactly the opposite is the case. Marx's idea is that the working class must break up, shatter the 'ready-made state machinery,' and not confine itself to merely taking possession of it" (Ex. 7, p. 33). Marx's confinement of violent destruction of the state to the European continent is rejected by Lenin in view of subsequent developments in England and the United States (Ex. 7, p. 34):

> Today, in 1917, in the epoch of the first great imperialist war, this exception made by Marx is no longer valid. Both England and America, the greatest and last representatives of Anglo-Saxon "liberty" in the sense of the absence of militarism and bureaucracy, have today plunged headlong into the all-European dirty, bloody morass of military bureaucratic institutions to which everything is subordinated and which trample everything under foot. Today, both in England and in America, the "precondition of any real people's revolution" is the break-up, the shattering of the "ready-made state machinery" (brought in those countries, between 1914 and 1917, to general "European" imperialist perfection).

The dictatorship of the proletariat, says Lenin (Ex. 7, pp. 73–74), results in the establishment of democracy for the victorious revolutionists, but the defeated capitalists must be suppressed by force. This

is the function of the dictatorship; it is a weapon of suppression.

Lesson V relates to "Imperialism—Present Day Capitalism." The present stage of capitalist development is described as imperialism, and the United States is characterized as "the most powerful imperialist force in the world threatening the aspiration of the people of the world for peace, democracy, and progress" (p. 22). This is the stage of dying capitalism, when the capitalist systems are in a period of "general crisis." The imminence of the proletarian revolution is recognized, for there is, then, an "intensification of the class struggle—growth of revolutionary movements" (p. 19).

The reading assigned for self-study in *Foundations of Leninism* (Ex. 5, p. 15) sums up the situation:

> In other words, imperialism has brought it about, not only that revolution has become a practical inevitability, but also that favorable conditions have been created for a direct onslaught upon the citadels of capitalism.

Lesson VII is on the meaning of Socialism. Socialism is described as the establishment of the political power of the working class through a fundamental change in the class control of society—revolution. The lesson poses the following questions for discussion:

> What is revolution? What are the essential pre-conditions for the socialist revolution?

The *Outline*, page 28, sets forth the answer to the second question as follows:

> It is not sufficient for revolution that the exploited and oppressed masses understand the impossibility of living in the old way and demand changes; for revolution it is necessary that the exploiters should not be able to live

and rule in the old way. Only when the "lower classes" do not want the old and when the "upper classes" cannot continue in the old way, then only can the revolution be victorious.

The above answer may appear ambiguous. But the Party member is made to understand its full meaning when he refers to the full quotation appearing in the reading assigned for this lesson in *Foundations of Leninism* (Ex. 5), Chapter III, Part 3, at page 45:

> The fundamental law of revolution, which has been confirmed by all revolutions, and particularly by all three Russian revolutions in the twentieth century, consists in the following: it is not enough for revolution that the exploited and oppressed masses should understand the impossibility of living in the old way and demand changes; for revolution it is necessary that the exploiters should not be able to live and rule in the old way. Only when the "lower classes" cannot carry on in the old way—only then can revolution triumph. This truth may be expressed in other words: *Revolution is impossible without a nationwide crisis (affecting both the exploited and the exploiters).* [My italics.—J. S.] It follows that for revolution it is essential, first, that a majority of the workers (or at least a majority of the class-conscious, thinking, politically active workers) should fully understand the necessity for revolution and be ready to sacrifice their lives for it; secondly, that the ruling classes should be passing through a governmental crisis which would draw even the most backward masses into politics * * * weaken the government and make it possible for the revolutionaries to overthrow it rapidly.

Thus, the lesson instructs the Party member that the "preconditions for the socialist revolution" are (1) a nationwide crisis and (2) that the workers "fully

understand that revolution is necessary and be ready to sacrifice their lives for it."

Going back to the other question in Lesson VII, "What Is a Revolution?", the answer is found in the "Additional Reading" in Stalin's *Problems of Leninism* (Ex. 6). In this book Stalin deals with the necessity for "seizing" power and establishing the dictatorship of the proletariat (pp. 16–19), and then ridicules the idea that this can be achieved without a violent revolution (pp. 19–20):

> Can such a radical transformation of the old bourgeois system of society be achieved without a violent revolution, without the dictatorship of the proletariat?
>
> Obviously not. To think that such a revolution can be carried out peacefully within the framework of bourgeois democracy, which is adapted to the domination of the bourgeoisie, means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the proletarian revolution.
>
> It is necessary to insist on this all the more strongly, all the more categorically, since we are dealing with the proletarian revolution which has for the time being triumphed in only one country, a country surrounded by hostile capitalist countries, a country the bourgeoisie of which cannot fail to receive the support of international capital.

That is why Lenin states that "* * * the liberation of the oppressed class is impossible not only without a violent revolution, but also without the destruction of the apparatus of state power, which was created by the ruling class." *Collected Works,* Vol. XXI, Book 11, p. 155; *State and Revolution,* Little Lenin Library, p. 9.

The assertion that the proletarian revolution must depend on the majority of the population supporting it is quickly disposed of as the view of "the henchmen of the bourgeoisie."[48] That support, say Lenin and Stalin, will come with a victorious revolution. Thus (*id.*, pp. 20–21)—

> Let the revolutionary proletariat, first overthrow the bourgeoisie, break the yoke of capital, break up the bourgeois state apparatus. Then the victorious proletariat will speedily gain the sympathy and support of the majority of the toiling non-proletarian masses by satisfying their wants at the expense of the exploiters. (*Collected Works*, Vol. XXIV, p. 647, Russian edition.)
>
> In order to win the majority of the population to its side, Lenin continues, the proletariat must first of all overthrow the bourgeoisie and seize state power and, secondly, it must introduce Soviet rule, smash to pieces the old state apparatus, and thus at one blow undermine the rule, authority and influence of the bourgeoisie and of the petty-bourgeoisie and of the petty-bourgeois compromisers in the ranks of the non-proletarian toiling masses. Thirdly, the proletariat must completely and finally destroy the influence of the bourgeoisie and of the petty-bourgeois compromisers in the ranks of the non-proletarian toiling masses. Thirdly, the proletariat must completely and finally destroy the influence of the bourgeoisie and of the petty-bourgeois compromisers among the majority of the non-proletariat toiling masses by the revolutionary satisfaction of their economic needs at the expense of the exploiters. (Ibid., p. 641)
>
> **Such are the characteristic symptoms of the proletarian revolution.**

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[48] The same view is expressed in the reading assigned for Lesson VIII, from *Foundations of Leninism* (Ex. 5, Ch. II, pp. 22, 23).

The dictatorship is not a "popular," "elected," or "non-class" government, "and does not deceive either itself or others by talk about popular, elected government, sanctioned by the whole people." (*Id.*, pp. 22–23).

Lesson VIII in the *Outline* deals with the function and structure of the Communist Party in the United States. The Party functions as the organized vanguard of the working class which has "its own discipline, and unity of will and action."

The final lesson, Lesson IX, is on the subject of "Strategy and Tactics," the science of working class leadership. The main aim is described (p. 34) as winning the majority of the working class "for the revolutionary struggle against capitalism," and the essence of strategy and tactics is to "Find [the] main link which will set large numbers of masses into motion and prepare them for final struggle."

The readings in *Strategy and Tactics* (Ex. 13, pp. 46–48) point out that one aspect of correct tactics is the combining of legal and illegal activities in aid of the proletarian revolution:

> * * * Inexperienced revolutionaries often think that legal methods of struggle are opportunistic because in this field the bourgeoisie particularly frequently (especially in "peaceful," non-revolutionary times) deceived and fooled the workers, and they think that illegal methods of struggle are revolutionary. But this is not true. What is true is that the opportunists and the traitors to the working class are those parties and leaders who are not able or who do not want (don't say: you cannot; say: you won't) to apply illegal methods of struggle in conditions such as those which prevailed, for example, during the imperialist war of 1914–18, when the bourgeoisie of the freest democratic countries deceived the workers in the most impudent

> and brutal manner and prohibited everyone from speaking the truth about the predatory character of the war. But revolutionaries who are unable to combine illegal forms of struggle with every form of legal struggle are very poor revolutionaries * * *. The main task of contemporary Communism in Western Europe and America is to acquire the ability to seek, to find, to determine correctly the concrete path or the particular turn of events that will bring the masses right up to the real, decisive, last and great revolutionary struggle.

But when the masses are "right up" to the last and great revolutionary struggle the reading cited in *Strategy and Tactics* (Ex. 13, p. 66) points out the course to follow:

> When the revolutionary tide is rising, when the ruling classes are disorganized, the masses are in a state of revolutionary ferment, the intermediary strata are inclining towards the proletariat and the masses are ready for action and for sacrifice, the Party of the proletariat is confronted with the task of leading the masses to a direct attack upon the bourgeois state. This it does by carrying on propaganda in favor of increasingly radical transitional slogans (for soviets, workers' control of industry, for peasant committees, for the seizure of the big landed properties, for disarming the bourgeoisie and arming the proletariat, etc.) and by organizing mass action, upon which all branches of Party agitation and propaganda, including parliamentary activity, must be concentrated. This mass action includes: Strikes; a combination of strikes and demonstrations; a combination of strikes and armed demonstrations and finally, the general strike conjointly with armed insurrection against the state power of the bourgeoisie. The latter form of struggle, which is the supreme form, must be conducted according to the rules of war; it presupposes a

> plan of campaign, offensive fighting operations and unbounded devotion and heroism on the part of the proletariat. An absolutely essential condition precedent to this form of action is the organization of the broad masses into militant units, which, by their very form, embrace and set in action the largest possible numbers of toilers (Councils of Workers, and Peasants' Deputies, Soldiers' Councils, etc.), and intensified revolutionary work in the army and navy.

Testimony concerning another *Outline* issued by the National Education Commission was given by Government witness Clontz (Tr. 663–664).[*] In August 1950, on petitioner's recommendation, Clontz attended the Jefferson School of Social Science (R. 52–53), a Party front organization in New York City (R. 25). In a course which he taught on "Teaching of Marxism," Doxey Wilkerson, the School Director and liaison officer with National Communist Party Headquarters (R. 53), commented on this *Outline* as follows (Tr. 663–664):

> * * * [F]or the record the National Party had ordered all these outlines and study materials called in. * * * [A]fter the first trials that took place in New York it had been established that Marxism-Leninism was revolution and for that reason any books that preached revolution were being brought in or discontinued and from that period on, after August of 1950, many things would be left unwritten, many things would be left unsaid so far as the

[*] Clontz was a confidential informant who reported to the FBI on Party activities in North Carolina and elsewhere from 1948 until 1952, when he ceased his Party activities. He remained in close and constant association with petitioner during all of this period (Tr. 560–567). Clontz was graduated from Davidson College in 1947 (Tr. 555) and from Duke University Law School in 1950 (Tr. 559). At the time of the trial he was a practicing attorney in Charlotte, North Carolina (Tr. 555).

public was concerned, but would have to be interpreted by members of the Party who, after all, would know that the basic strategy of the Communist Party would never change, that is, overthrowing the government and bringing a Communist United States here.

APPENDIX B

In the United States District Court for the Middle District of North Carolina

No. 4230-G

UNITED STATES OF AMERICA

vs.

JUNIUS IRVING SCALES

FINDING OF FACT, CONCLUSION OF LAW AND ORDER

This cause having come before the Court by virtue of a motion filed by the defendant to dismiss the indictment because of the illegal selection of the grand jury panel which returned the indictment in the above entitled cause, and the Court having considered said motion and the briefs of counsel for the defendant and for the United States of America on said motion, and having heard such evidence and legal arguments in open court on April 1, 1965, as the defendant and the United States of America desired to present, and having fully considered all the facts as well as the law involved, makes the following findings of fact:

1. That the defendant was indicted by the Grand Jury for the Middle District of North Carolina at Wilkesboro, North Carolina on November 18, 1954 and that the defendant was arrested shortly thereafter in Memphis, Tennessee.

2. That on December 7, 1954, the defendant was brought before the United States District Court, Middle District of North Carolina for the purpose

of arraignment at which time the defendant was without counsel and declined an offer of the Court to appoint counsel.

3. That the defendant was again brought before the District Court on December 16, 1954, at which time the Court appointed counsel to represent the defendant for the sole purpose of arraignment and upon his arraignment the defendant pleaded not guilty.

4. That before the defendant was arraigned the Court entered an order that the plea to the charge in the indictment by the defendant would not constitute, on the part of the defendant, a waiver to his right to file pre-trial motions in this case before the 5th of January, 1955.

5. That upon the request of counsel and acquiesced in by the defendant, the time for filing pre-trial motions was extended from the 5th of January to the 14th of January, 1955.

6. That the defendant failed to file any pre-trial motions by the 14th of January, 1955. However, on this date the defendant appeared in Court with counsel, Mr. Ruben Terris, who, after requesting 60 days extension to file pre-trial motions and a discussion regarding such extension, was granted until the 18th of February, 1955, to file any and all pre-trial motions.

7. That the Court set the 2nd of March, 1955, as the date by which replies by the Government to all pre-trial motions must be made and the 8th of March, 1955, for the date of hearing on such motions. The Court at that time also set the 11th of April, 1955, for the trial.

8. That pre-trial motions were filed by Mr. David Rein, counsel for the defendant on the 18th of Feb-

ruary, 1955: That the Government filed its answers on or before the 2nd of March, 1955.

9. That on the 8th of March, 1955, 23 days after the deadline set for filing pre-trial motions, counsel for the defendant indicated for the first time he might desire to file a motion attacking the grand jury.

10. That the defendant was granted at his first request 29 days from the date of arraignment for filing motions: That he was later granted 35 days more: and that he was granted a total of 65 days from the date of his arraignment in which to file pre-trial motions.

11. That the defendant did not file his motion attacking the grand jury until 24 days after the deadline of the 18th of February, 1955, had expired and 88 days after the date of the arraignment, which was the 16th of December, 1955.

12. That the information necessary to support defendant's motion attacking the grand jury was available to the defendant and/or his counsel at the time of his indictment and had been available at all times within the period set by the Court for the filing pre-trial motions.

13. That there was no attempt by the defendant or his counsel to show cause or excuse for the delay in filing the motion attacking the grand jury.

14. That the Clerk of the District Court and the Jury Commissioners of this District would jointly send out to reputable citizens (sponsors) of knowledge and character who knew the people in their community, several different types of form letters requesting each of these sponsors to furnish a list of names of individuals suitable for jury service.

15. That the various form letters would request that the sponsors would furnish on their lists, names of

women, negroes, freeholders and persons affiliated with both the Democratic and Republican Parties.

16. That the word "Freeholder" as set forth in one of the exhibits was by no means a restriction, but was simply the designation of another source to be tapped for the names of prospective jurors.

17. That there was no intimation of any discrimination in favor of or against any particular class, by reason of political or religious faith, or race, color, or sex, or any other classification.

18. That the evidence failed to disclose any delegation of duty by the Clerk of the District Court or by the Jury Commissioner in selection of prospective jurors for service.

19. That the Clerk and Jury Commissioner exercised reasonable screening of the prospective jurors in that the Clerk and Jury Commissioner examined the names and reasonably measured each prospective juror against the statutory requirements.

20. That examination of the prospective jurors was also made by the Clerk and Jury Commissioner by availing themselves of the judgment of persons who were familiar with the prospective jurors and the areas from which they were drawn.

21. That the method used in the selection of Grand Juries was substantially the same for all the divisions of this District except that the prospective jurors for each division reside in that division.

22. That the Clerk of the District Court and the Jury Commissioner supervised and directed the selection of all names of prospective jurors, including those names inserted into the jury box for the Wilmington Division of this Court.

23. That there is a new jury box for each division made every five years; in years evenly divisible by five.

24. That the Clerk of the District Court or his deputy and the Jury Commissioner for each respective division when filling the jury box for that division, would insert into the jury box the names of prospective jurors alternately, and one name at a time until the jury box contained the number of names required by the Courts Order.

25. That when the Clerk of the District Court and the Jury Commissioner inserted names into the jury box, they did so without any regard to the race, creed, color, sex or political affiliation of such person.

26. That in making up the jury box for each division there was no attempt on the part of the Clerk of the Court or the Jury Commissioner to systematically or intentionally exclude any class or group of persons from the jury box.

27. That from the names in the jury box prospective jurors were drawn and summoned for jury service. That on the reverse side of the summons was a questionnaire asking various questions regarding the name, address, occupation, citizenship, prior jury service, prior convictions, which the prospective jurors were to fill out and return to the Clerk.

28. That, although many questionnaires were not completely answered, the Clerk of the Court or his deputy would examine the answers on each questionnaire.

29. That from the group of prospective jurors summoned nineteen were drawn by a child of tender years to serve as the Grand Jury. That the remaining prospective jurors would form the petit jury panel.

That upon the foregoing facts it is concluded as a matter of law that the motion of defendant to dismiss the indictment in this case because the grand jury was illegally selected was not timely filed. It is further concluded that the evidence did not show any prejudicial defects that would result in a denial to the defend-

ant of any of his rights and that there was not any serious or substantial departure or deviation from the statutory requirements.

Of course, passing on the merits is not necessary because the motion has been rejected for its tardiness; however, the Court feels that, if there is any error in refusing the motion on the time element, it is proper to, and the Court should, pass upon the merits.

The Court denies this motion.

/s/ ALBERT V. BRYAN,
United States District Judge.

GREENSBORO, N. C., *April 15, 1956.*

U. S. GOVERNMENT PRINTING OFFICE, 1956

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Nos. 3 and 4

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH DANIEL CARLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHARLES MACK LAWRENCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

[redacted]

[redacted]

[redacted]
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 3

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4

CLAUDE MACK LIGHTFOOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES ON REARGUMENT

A. Each of these cases involves, *inter alia,* substantially the same production-of-documents issue which was raised and decided in *Jencks* v. *United States,* 353 U.S. 657. See Brief for the United States in *Scales,* No. 29, Oct. Term, 1956, pp. 74-77; Brief for the United States in *Lightfoot,* No. 32, Oct. Term, 1956, pp. 38-40. Each case, accordingly, must be reversed for further proceedings in the light of the *Jencks* decision. On the retrial, if the same witnesses

are called by the Government and demand is made for production of their written statements to the F.B.I., the procedure will presumably be that directed by new Section 3500 of Title 18 of the United States Code, as added by Public Law 85-269, 85th Cong., 1st Sess., approved on September 2, 1957.

B. We assume that the Court, in nevertheless restoring the cases to the docket for reargument (the order directing reargument was entered on the same day, June 3, 1957, on which *Jencks* was decided, 353 U.S. 979), desires to hear reargument of the constitutional and other issues involved in these cases, particularly the validity of the Smith Act's membership clause on its face and as applied. Should the Court sustain the validity and application of this clause, reversal would presumably be limited to the production-of-documents issue. Should the Court, on the other hand, hold that the membership clause is invalid or inoperative, either on its face or as applied, or that there is insufficient evidence to warrant a retrial (cf. *Yates* v. *United States*, 354 U.S. 298, 327-334), the result would be either (1) that the cases will have to be dismissed, or (2) that new trials will be required under the Court's directions with respect to the admission of evidence or for the giving of different instructions to the jury (in addition to compliance on the production-of-documents issue)—depending upon the precise scope and nature of the rulings.

The purpose of this supplemental memorandum is (1) to clarify some aspects of our argument at the last term on the constitutional issue, and (2) without in any wise abandoning our position that the membership clause has been properly and validly applied in

these cases, to present certain suggestions as to the disposition of the cases should that position not be wholly accepted by the Court. On the other issues in the two cases—evidential, statutory, and procedural—we rest on the discussion in the briefs on the original arguments.

1. In defending the validity of the membership clause on its face, and as applied here, in our briefs on the original arguments (*Scales*, pp. 23-26, 33-48, adopted by reference in *Lightfoot*, at p. 35), we urged that that clause, properly construed, does not apply to "a merely passive status", but solely to "*active* membership" (see our *Scales* brief at pp. 41, 43-44, 45, 47, emphasis added) in a society, group, or assembly of the type defined by the Act, with the requisite knowledge and intent. Since neither jury in these cases was specifically instructed that a finding of such *active* membership was requisite to conviction,[1] there was implicit in our argument the idea that the determination that the membership be of an active quality was not required to be made by the jury, but could be made by the court—in the same manner that a finding of the existence of a "clear and present danger" is one which is properly made by the court rather than by the jury (*Dennis* v. *United States*, 341 U.S. 494, 511-515).

We emphasize that we do *not* suggest that the factor of "activity" is to be considered an element of the crime established by the Smith Act, to be proved in

[1] The juries were instructed, in substance, that the essential elements of the offense were (1) membership in a society, group, or assembly which advocates the violent overthrow of the Government, together with (2) knowledge that the group so advocates and (3) the personal intent to bring about such overthrow as speedily as circumstances would permit.

addition to (a) membership, (b) knowledge of the group's unlawful objective, and (c) personal intent to bring about that objective. This factor of "activity" is not at all a constituent element of the offense but, rather, an independent and controlling constitutional standard by which to test whether the membership clause of the Smith Act has been validly applied in a particular case. Statutorily, the crime is fully proved by sufficient evidence of membership, knowledge, and intent, but the "activity" test then determines whether the conviction can be allowed to stand under the Constitution. Just as the finding of "clear and present danger" is not an integral element of the various offenses under the Smith Act, but an external constitutional limitation on the validity of convictions under the Act which are otherwise proper, so, in our view, the factor of "activity" plays the same limiting role with respect to the membership clause.

For this reason—that the "activity" factor is not an element of the offense but an overriding constitutional test—we think it plain that the determination of "activity" is not for the jury but for the court—on the basis of its own evaluation of all the evidence adduced by both sides. With respect to this determination, as well as for the "clear and present danger" finding, "[t]he question * * * is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. * * * Bearing, as it does, the marks of a 'question of law,' the issue is properly one for the

judge to decide" (*Dennis* v. *United States*, 341 U.S. at 514-515).[2]

In these two cases, this test of "activity" is fully met, as shown by the Statements in our original briefs and in the summaries of the evidence there set forth (*Scales*, pp. 10-23, 59-64; *Lightfoot*, pp. 4-20, 29-34). It is indisputable that each petitioner was a significant Party leader, devoting a considerable portion of his time and efforts to the activities, and furthering the cause, of the Communist Party. We submit that the Court should have no difficulty whatever in determining, on these records, that the constitutional test of "activity" is satisfied in both cases.[3]

2. If, however, the Court, while accepting our position that only *active* membership can be made punishable by the Act, should be of the view that the determination of whether the membership is or is not of an active quality is for the jury to decide—if, in other words, the Court should rule that this issue is an integral element of the crime which must, like other such elements, be submitted to the jury—it is evident that new trials would be required at which this issue could be presented to the juries under proper instructions.

Should the Court hold that this is required, it would be desirable, we suggest, to give guidance to the trial courts as to the contents of a proper instruction. As we have indicated, it is one of the purposes

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[2] If we are right, the determination can be made by this Court in the first instance. Cf. *Dennis* v. *United States*, 341 U.S. at 510-511.

[3] The appropriate standard for the Court to apply would be the same as that suggested *infra*, pp. 6-7, for an instruction to the jury on "active" membership, if such a charge should be held to be required.

of this memorandum to set forth what we consider an appropriate instruction on this subject should the Court hold such a charge to be required. It is submitted, accordingly, that an instruction phrased in substance as follows would be appropriate:

> You are further instructed, however, that it is not every membership in a society, group, or assembly of the kind I have described to you which this statute prohibits. The membership must be something more than a merely nominal, passive, inactive, or purely technical membership in order for you to bring in a verdict of guilty, and this is true irrespective of whether the member may have had knowledge of the nature and purposes of the society, group, or assembly in question, and even if he may have fully intended to bring about the forcible overthrow of the Government as soon as circumstances permit. I charge you that it is only active membership which is forbidden by this statute. Only if you find that the defendant was, during some or all of the period in question, an active member of an organization or group of the type I have described may you convict him, and even then only if the other requisites which I have mentioned, namely, knowledge and intent of the sort I have described, are also found by you to have been present.
>
> In determining whether the defendant was an active member in the sense I have referred to, the test which you should apply is this: Did he devote all or a substantial part of his time and efforts towards carrying on the work of the organization to which he belonged and furthering its ends?

If so, he was an active member, and you should return a verdict of guilty provided all the other elements which I have mentioned to you were also present. If not—if he devoted only a negligible amount of his time and efforts in that manner, or none at all—then he was not an active member, and you must return a verdict of not guilty regardless of what else you may find.

We believe that an instruction phrased in substantially the above language—assuming that any such instruction is necessary—would fully obviate petitioners' objection to the membership clause of the Smith Act on the ground that it applies indiscriminately to the merely passive member as well as to the active one.[4]

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1957.

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[4] In these two cases, there is no difficulty with the element of "membership" since both petitioners have admitted membership in

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 323

JUNIUS IRVING SCALES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 324

CLAUDE MACK LIGHTFOOT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 29.

JUNIUS IRVING SCALES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 32.

CLAUDE MACK LIGHTFOOT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

INTEREST OF AMICUS.

The American Civil Liberties Union, appearing herein with the consent of all parties, filed with the Clerk of the

Court, is a nationwide non-partisan organization devoted solely to the protection and advancement of constitutional rights which are fundamental to the democratic way of life. It has no other program, either political, economic, social or philosophical.

The instant cases are the first to reach this Court in which convictions have been obtained under the so-called "membership" provisions of the Smith Act. *Amicus* believes that these convictions are inconsistent with the First Amendment freedoms of speech and association and that the constitutional questions which they raise are distinct from those already considered by this Court in the *Dennis* case. Significant issues are presented, the resolution of which will have a vital effect on freedom of political discussion and association in America today. *Amicus* has no interest in the ideas or beliefs of these petitioners and, accordingly, addresses itself solely to what it believes to be the questions of principle here involved.

QUESTION TO BE ARGUED.

Amicus believes that the central civil liberties issue in these cases is the relationship between the statute and the indictments laid thereunder and freedom of speech and association. Accordingly, this brief will be devoted solely to a discussion of the validity of the statute and the indictments, under the First Amendment to the Constitution.

THE STATUTE AND THE INDICTMENTS.

The petitioners in these cases were indicted and convicted under the membership provisions of Section 2 of the Smith Act which, together with the organizing provisions, read as follows:

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government [in the United States] by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—shall be fined not more than $10,000 or imprisoned not more than 10 years, or both. * * *" 18 U. S. C. 2385.

The indictments, which are in substance identical, charge:

1. That the Communist Party of the United States was during the times alleged, a group of persons who teach and advocate the overthrow of the government of the United States by force and violence as speedily as circumstances would permit, and

2. That each defendant had been a member of the said Communist Party knowing that it advocated the doctrine charged in paragraph 1, and each defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit.

ARGUMENT.

The Membership Provisions of the Smith Act and the Indictments in These Cases Violate the First Amendment to the Constitution.

The decision of this Court in *Dennis* v. *United States*, 341 U. S. 494, is the starting point for any discussion of the constitutionality of the membership provisions of the Smith Act. That case upheld the convictions of a group of Communist Party leaders for conspiracy to violate the advocacy and organizing provisions of Section 2 of the Smith Act. The defendants were convicted of conspiring to (1) organize as the Communist Party of the United States a group of persons who advocated the overthrow of the government by force and violence and (2) advocate the duty and necessity of overthrowing the government by force and violence.

The prevailing opinion, written by Mr. Chief Justice Vinson, recognized that legislation punishing political speech is permitted under the First Amendment only when the speech in question, considering the circumstances in which it occurs, gives rise to a clear and present danger of a substantive evil which Congress has the power to prevent. In *Dennis*, the substantive evil was an attempt to overthrow the government by force and violence. The requisite clear and present danger was held to exist in both of its aspects, first, the nature of the defendants' activities—

> "the formation by petitioners of • • • a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action. • • • It is the existence of the conspiracy which creates the danger." 341 U. S. at 510, 511.

and second, the setting in which they occurred—

> "coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned . . ." 341 U. S., at 511.

Both aspects of the clear and present danger test were emphasized in the statement,

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." 341 U. S. at 516.

Under *Dennis*, not all advocacy of the doctrine of violent overthrow may be punished. Only such advocacy as creates a clear and present danger, considered in the setting in which it occurs, can constitutionally be criminalized. Although such doctrine is likely to arouse the strongest hostility in the community at large, it is nevertheless protected by the constitutional guaranty of free political debate, absent clear and present danger.

The elements of the statutory crime of membership stand in sharp contrast to the activity punished in *Dennis*. They are:

1. That the defendant belonged to the organization in question,
2. That the organization to which the defendant belonged advocated the overthrow of the government by force and violence and
3. That the defendant knew such advocacy to be the purpose of the organization.

On its face, the statute punishes knowing membership in a group advocating the doctrine of violent overthrow even where the defendant disagrees with such advocacy.

The indictments in the instant cases seek to obviate this result by alleging as an additional element that each defendant intended to bring about the overthrow of the government by force or violence as speedily as circumstances would permit. The government here relies upon the holding in *Dennis* that such an intent is a necessary part of an offense under the advocacy and organizing provisions of the statute. *Dennis* reached this conclusion on the ground that "Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow" 341 U. S. at 499. But no such inference justifies importing an intent requirement into the membership provisions of the statute. Indeed common experience concerning the likelihood of disagreement within political organizations points to the opposite conclusion. Without an intent requirement the statute violates the Constitution. See *Herndon* v. *Lowry*, 301 U. S. 242, 258, 259.

But even if the statute is interpreted as permitting the portions of the instant indictments which charge an intention to bring about violent overthrow as speedily as circumstances permit, the elements of the membership offense may be proved by evidence which falls far short of that required by the Constitution. The only act which must be shown is that of membership or association. The individual charged need never have engaged in any other conduct designed to further the forbidden teaching. He need not himself have engaged in any advocacy. Guilty knowledge can be found from evidence that the defendant was acquainted with the literature on which the prosecution relies to show that the organization advocated the doctrine of violent overthrow. Or it might be enough if the defendant attended meetings and heard speeches which the jury decides expressed the prohibited doctrine. And an unlawful intent may be found by a jury from the act of

membership, coupled with guilty knowledge. With no overt act other than membership to guide it, the jury, seeking knowledge and intent, is "adrift on a sea of speculation." The emphasis is on what the defendant thinks rather than what he does. Since the crux of the crime is association with groups advocating violent revolution, the danger is great that convictions will be based not on the acts or even the state of mind of the defendant but rather on a general antipathy towards those with whom he has associated.

How can membership in a group advocating violent overthrow unaccompanied by any other overt act, even when coupled with guilty knowledge and intent, create a clear and present danger? The answer offered by the courts below was to treat such membership as participation in a conspiracy. In *Frankfeld* v. *United States*, 198 F. 2d 679, 684, Judge Parker said:

> "Membership in an organization renders aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged."

After quoting this passage in its opinion in the *Scales* case, the court below added,

> "The membership clause of the statute is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes and that all are guilty who join it with knowledge of such purpose; and all that the statute does is apply this fundamental concept of conspiracy to an organization having for its purpose the forcible overthrow of the government." 227 F. 2d 581, 587.

This position ignores crucial differences between speech crimes and ordinary criminal conspiracies. In so doing, it violates fundamental constitutional principles. The ordinary criminal conspiracy has for its purpose the accomplishment of a single objective, be it bank robbery or espionage. The purpose is clearly criminal and there can be no ambiguity about the state of mind of one who knowingly participates in the common enterprise. On the other hand, the basic activity of a group engaged in advocacy—political speech—has a high social value, receives special protection under fundamental law and becomes criminal only under exceptional circumstances. Moreover, a revolutionary political group invariably has a complex program of social, economic and philosophical objectives, many of which are likely to bear no necessary relationship to the prohibited advocacy. It is a matter of common knowledge that such groups openly seek the support of persons of diverse views, using rhetoric drawn from many different political and social traditions. Whether we consider Marxism-Leninism, corporate fascism or home-grown racism, we are likely to find political programs which deal with many questions other than the desirability of violent overthrow. Thus, an individual may join a group which advocates violent overthrow in order to work for other parts of its program or he may join to make an effort to change that part of its platform. He may not, in fact, interpret its texts as advocating revolution. He may join at a time when the group's position is in doubt or in process of change towards or away from such advocacy. He may join at a time when external conditions are such that the forbidden advocacy presents no clear and present danger and, having done so, may have difficulty in predicting exactly when changed circumstances will lead a court to hold otherwise. Or he may believe in the doctrine of violent overthrow and wish to join a group which

discusses such ideas without, however, wishing to participate in any advocacy or other activity calculated to bring about such an objective.

In each of these cases guilty knowledge and intent could be found from evidence which points to no overt act other than that of joining. Because of the strong antagonism which revolutionary doctrine arouses in the community, the danger is great that such findings will be made with ease. The result will be suppression of political speech and association which realistically do not present any clear and present danger of an attempt to overthrow the government by force.

To legally assimilate group speech crimes to ordinary criminal conspiracies is to ignore the vital differences between them. To apply the harsh conspiracy rule of imputed guilt to the inactive members of a radical political group is contrary to basic principles of fairness and political liberty. And, as pointed out above, requiring a guilty state of mind affords little, if any, protection against the dangers of unfairness which are inherent in a statute punishing membership.

The law which is shaped today in dealing with these Communist defendants may determine on some tomorrow whether we will face a repetition of the suppression which characterized many World War I Espionage Act prosecutions and post-World War I prosecutions under state syndicalism statutes. The clear and present danger test which grew out of these chapters of history was designed to provide some limiting principle in dealing with the power of government to punish speech which poses no significant threat to the community. In the *Dennis* case, that doctrine was expanded to permit, under some circumstances, the punishment of revolutionary advocacy even though no imminent threat from the defendants' teach-

ing was demonstrated. The government argued that it could not be compelled to wait until the eve of an attempt.

What the government asks here goes much further. For the validation of convictions under the first federal statute which has sought to punish mere membership in groups advocating revolutionary doctrine will have a damaging effect on the characteristically American habit of expressing political and social views by joining the countless groups of all types that dot our national scene.

It is appropriate to ask, therefore, what great interest is to be served by the tool which the government seeks permission to use. Whenever organized advocacy presents a significant threat, surely the requirement of charges and proof modeled on the *Dennis* case does not impose an unfair burden on the government. Conversely, it is difficult to see how inability to punish membership involves such risk that fundamental principle should be sacrificed.

CONCLUSION.

For the foregoing reasons, we urge that the judgments below be reversed.

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